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DOWNSIZING IN RETAIL CHAPTER 11 CASES

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I. Introduction

Over the last several years, a substantial number of retailers have commenced chapter 11 cases. These retailers range from dominant national department store chains to “ma and pa” operators of various types of stores. Although no two cases are the same, retail cases involving debtors with multiple locations have many elements in common. Large retail companies will attempt to "right-size" their businesses, and, to do so, often need to dispose expediently of inventory and leases associated with stores that must be closed. The Bankruptcy Code[1] and related caselaw provide debtors with certain powers and abilities that make such expedient dispositions possible. Chief among those powers and abilities, for purposes of this discussion, are those created by provisions that permit debtors to close stores, including the ability to reject or assign leases and conduct going-out-of business sales (“GOB Sales"). Because a retailer's two most significant assets may be its inventory and its leases, many retail chapter 11 cases are commenced solely to invoke these powers, and to maximize the value of these assets and minimize the liabilities incident thereto.

II. GOB Sales, Generally

As a general proposition, all large retailers have locations that are unprofitable on a "four-wall" basis. The worst-performing of these locations are usually easily identified prior to the commencement of a chapter 11 case, and often are blamed for the demise of the enterprise. One of the first things that a retail debtor may do, after commencing a bankruptcy case, is close its worst-performing stores. A debtor must maximize the value of its assets, including the inventory, furniture, fixtures and equipment, at unwanted store locations in the most reasonable and efficient manner. Accordingly, particularly if a large number of stores are being closed at once, the debtor may hire a liquidator to dispose of the inventory in the unwanted store locations through GOB Sales.

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1 11 U.S.C. §§ 101-1330 (hereinafter referred to as the “Bankruptcy Code”).

III. How a Liquidator Views the World

When a retailer asks a liquidator to value its inventory, whether for the purposes of an appraisal to fix advance rates in connection with a lending transaction or in connection with GOB Sales, it is often a mystery to the retailer how the liquidator performs that valuation. From a liquidator's point of view, fixing the value of inventory is a function of a multitude of factors, including (a) quality of the inventory, (b) extent of expenses, (c) historic sales base, (d) historic margins, and (e) goodwill. It is important to note that the value of inventory is determined only at a specific point in time. Such factors as replenishment, time of year and the retailer's discounting practices can quickly and dramatically alter the value of inventory.

In the context of GOB Sales, to obtain the best value for the inventory, the retailer should engage in the following process:

(a) Getting Started. The first thing the retailer may do is contact a liquidation agent and require that the agent execute a confidentiality agreement as a condition to becoming entitled to receive information. Such agreements are important because the liquidator may require information, such as store-specific profit and loss statements and category-by-category inventory and sales information, that should not fall into the hands of the retailer's competitors.

The following information is usually requested by the liquidator:

(1) Store Number;

(2) Store Address/City/State/Zip Code;

(3) Monthly sales receipts by store for the previous 15 months;

(4) Most recent retail and cost inventory by category, by store;

(5) Monthly average inventory balance;

(6) Last year's comparable period inventory balance;

(7) Current planned inventory on-order;

(8) Initial markup & maintained margin analysis;

(9) Historic inventory performance by category;

(10) Detailed income statements by store for previous 3 months. These statements may include: net sales, cost of goods sold, gross margin, store selling/store management payroll, store commissions/bonuses, payroll taxes and benefits,

advertising; and occupancy expenses (including rent, CAM, real estate taxes, miscellaneous expenses);

(11) Detailed income statements by store for previous year's comparable sale period (e.g., if liquidation sale was to be March 1 – June 30, 2000, March – June 1999 profit and loss statements would be requested);

(12) Explanation of accounting calendar (i.e., 4-4-5 vs. calendar year);

(13) Promotional calendars for previous year's comparable period; and

(14) List of remaining stores in markets in which there is a closing store.

Retailers often find that this information is difficult to ascertain or provide. In fairness to such retailers, there is often so much going on, and so much out of the ordinary course disruption, at the advent of a chapter 11 case that putting together such detailed information may often be the last thing on the agenda. For a retailer to get the best value possible for its inventory, however, it must take whatever steps are necessary to get the liquidator all requested information. This is not to say that the liquidator would not endeavor to conduct the GOB Sales, or make an offer to do so, without such information – liquidators may be willing to move forward under almost any circumstances. But, to the extent gaps in information exist, the liquidator may build "cushions" into its numbers. The poorer the information, the more extensive the cushions. Accordingly, providing complete information may be critical to maximizing value.

(b) Store Visits. After the liquidator gets the information it requires, it sends representatives into the stores. Because it is often premature to let store personnel know that a store may be closing, retailers often want the liquidator to go to the stores "unannounced" – that is, secretly and without the appearance of corporate authority. This may be problematic for the liquidator, because looking through the backrooms may be just as important as walking the stores. Corporate authority to permit this type of examination is often established in a surreptitious fashion, such as by introducing the liquidator's representatives as insurance investigators or bank employees. In any event, to properly value the inventory, a liquidator's personnel, who are almost always seasoned retailers, must evaluate the nature and quality of the inventory, the pricing and markdown structure, the morale of the employees, the quality of the physical plants, the location of the stores and a multitude of other, "softer" issues.

(c) Modeling the Transaction. Once store visits have been completed and the relevant information assimilated, the liquidator puts together its "model." The liquidator, through its database of similar transactions and its assessment of the instant transaction, formulates the "recovery number" – that is, the percentage of the retail price that, on a gross basis, the liquidator believes customers will pay for the inventory in a store closing sale. The liquidator must then assess the expenses related to conducting such a sale. As a preliminary matter, the retailer must tell the liquidator which

expenses it expects the liquidator to bear. The liquidator usually bears all store-level expenses (such as payroll, advertising and supervision costs), often also bears occupancy costs (including store rent), and pays all its costs of the transaction (such as attorneys' fees and costs of capital). In the context of a complete and total liquidation, as distinguished from a closing of a lesser number of the retailer's stores, a liquidator may be asked to bear some "central office" expenses.

Ultimately, the more expenses the liquidator is asked to bear, the lower the price it will pay for inventory. If the liquidator takes on more of the retailer's expenses but pays a lower price for the inventory as a result, it will benefit most from a sale that is concluded quickly and thereby minimizes the liquidator's cost exposure. However, if the liquidator takes on fewer expenses but pays more for the inventory, it may be able to run longer sales without losing significant profitability. Moreover, in administratively insolvent cases, where the secured lender does not want to advance additional sums, the liquidator is often asked to bear all the expenses it requires to conduct the Sale.

Calculating how long a GOB Sale will take, and therefore how much exposure the retailer may have to rent and other expenses, may be tricky. How long a sale will take is often a function of the historic sales base of the stores in question and the multiple of those historic sales that the liquidator believes it can generate. Liquidators assess GOB Sales based on their perceived ability to "drive" sales volume in excess of the retailer's previous year's volume – what liquidators call a sales "multiplier" or sales "velocity." There are three general rules that govern the multiplier:

1. The higher the discount, the higher the multiplier;
2. The shorter the sale term, the higher the multiplier; and
3. The weaker the comparative selling season (or the lower the sales base), the higher the multiplier.

Taking the first rule first, given an adequate amount of time, every item in a store can theoretically be sold for full value. To incentivize customers to purchase the goods more quickly, the goods must be discounted. The greater the discount, the faster the goods will be sold, and the higher the multiplier that can be achieved.

As to the second rule, a long sale cannot sustain a high multiplier. GOB Sales depend upon a consumer's perception of urgency – that is, the perception that if the consumer does not purchase the goods today, the goods will not be there tomorrow. As a sale progresses, this sense of urgency decreases. The longer the sale, the more difficult it is to maintain urgency and sustain a multiplier. Generally, the only way to maintain "velocity" as a sale progresses is to increase discounts. Without substantially increasing discounts, it is generally impossible to maintain a high multiplier for a long sale term (in excess of 8-10 weeks).

The last rule is often counterintuitive to laypeople, but it is etched in stone — that is, the worse the selling season or lower the sales base, the higher the sales multiplier. The reason is simple — sales volumes are tied to foot traffic. During the Christmas season, for example, most retail businesses experience their highest sales volumes. To increase foot traffic during the Christmas season is very difficult, as the stores may already be operating at full capacity. During the Christmas season, many a retail store is akin to a car being driven at maximum speed. The car cannot move any faster, just as the

store cannot sell more inventory. During an off season with a low sales base and low foot traffic, there is room to increase sales and traffic by advertising a GOB Sale, just as there may be room to accelerate a slow moving car. A properly advertised, signed, discounted and marketed GOB Sale will likely increase sales volumes, particularly at times when sales volumes are low. By way of illustration, during a recent Christmas selling season, we acted as liquidator in one of the nation's larger liquidations. Although the sale was successful economically for us, we were able only to generate sales volume that was less than that of the previous sales year.

Other factors, such as advertising, the goodwill of the retailer at issue, consumers' perception of the retailer's pricing policies, the stores' locations and other retailer-specific items, may impact a sales multiplier. Nevertheless, the rules outlined above are applicable to every GOB Sale. Calculating how quickly the inventory will be sold, and at what discount, is the magic of the liquidation process.

Parenthetically, a retailer will often say that it can do as good a job of selling the inventory as the liquidator. This is almost never the case. There will probably not be much difference in the results achieved in selling the top 20% of the inventory – the retailer will do as well. But selling the "back end" of the merchandise – the less desirable inventory – is more difficult. Because the liquidator may have done thousands of GOB Sales, it knows what constitutes the least salable inventory, and what can be achieved in the sale of such inventory. By accelerating the discount on the back end of the inventory in the beginning of the sale, when there may be excitement and a lot of people in the stores, this inventory may be sold for more value than would be achieved at the end of the sale. This is one manner in which the liquidator is able to "create" value. Moreover, while a retailer runs its business day in and day out, a liquidator runs an 8-to-12 week event. If the retailer's operation is akin to a zoo, the liquidator runs the equivalent of a circus, and neither may be well equipped to operate in the other's forum.

(d) Making a Proposal and Selecting a Stalking Horse. Once the liquidator has modeled its transaction and knows what it can afford to pay, it is generally asked to create a proposal. There is usually a deadline imposed by the debtor/retailer in the bankruptcy context as to when proposals must be submitted. The liquidator makes its proposal, and sets forth the premises upon which that proposal is based. Significant among those premises is a start date, because, as previously mentioned, the value of inventory can change significantly over time.

Proposals can take three basic forms:

(i) Guaranteed Return. This type of proposal is the economic (if not the legal and tax) equivalent of the liquidator's purchasing the inventory. It generally calls for the transaction to be structured as an agency agreement under which the liquidator, as agent, guarantees (x) a specified percentage of the retail price of the total inventory and (y) that certain delineated expenses will be paid. The inventory is then counted by an inventory counting service and the liquidator is responsible for paying an amount equal to the aggregate retail value of the inventory multiplied by the guaranteed return percentage. For example, if the guaranteed return is 45%, and the inventory count is $10 million, then the liquidator would be responsible for paying $4.5 million to the retailer. The guaranteed amount may be paid in cash up front and/or from the sales proceeds. In the latter case, it is customary for the

liquidator to support its payment obligation through a letter of credit. It is not surprising that retailers and their lenders usually prefer cash up front, although the liquidator may pay slightly more in a letter of credit context, as its cost of capital is decreased.

(ii) Fee. Fee proposals may take may different forms, and the varieties of such proposals are limited only by the imaginations of the parties. Generally, a fee transaction requires the liquidator to pay a variable fee in connection with the GOB Sale. Fees based upon a percentage of sales are the most common, but fees based upon the number of store weeks and supervisors are also heavily utilized. A liquidator will almost always earn less under a fee arrangement than it would under a guarantee-style transaction. This is because the liquidator is at significantly greater risk (e.g., that expenses will be higher than expected or that the inventory will not be sold at expected values) in a guaranteed return transaction, and will set its price in light of that risk. On the other hand, a savvy retailer may be wary that, in a fee context, because the liquidator is not risking its capital, it may not commit the full resources necessary to maximize recoveries. Accordingly, there are incentives built into most fee arrangements to incentivize the liquidator to do well. Certain fee transactions may require the liquidator to operate pursuant to the terms of a strict budget.

(iii) Hybrid. Hybrid transactions may call for the payment of a guaranteed return, the payment of a defined fee (customarily 2% of sales) and sharing of receipts between the liquidator and retailer after the guaranteed return, defined fee and expenses are paid. Sometimes the hybrid takes a form which appears to create guaranteed return without the guarantee. In one recent case, the liquidator earned nothing until a net threshold was reached – a "phantom guarantee" – and thereafter net proceeds were shared. Hybrid transactions, whether of the “defined fee” or “phantom guarantee” genre, are becoming increasingly popular.

(e) Bidding Process. Once offers are received by the debtor, the debtor assesses which is better in light of its facts and circumstances. If a fee transaction is selected, the transaction is usually documented and approved without competitive bidding, with the liquidator being retained as a professional of the debtor's estate under section 327 of the Bankruptcy Code. If a guaranteed return transaction is selected, the transaction (often including bid protections and break-up fees) is negotiated and documented and a bid process is established. Approval for these transactions generally is sought under section 363 of the Bankruptcy Code (governing the use, sale or lease of property of the estate) and, as such, are often made subject to higher or better offers and court-approved auction procedures. Accordingly, it is customary for the "stalking horse" liquidator to be awarded a break-up fee if it is outbid by another liquidator offering better terms or a higher guaranteed return. It is important, in formulating auction procedures, to require that the amount of the break-up fee be subsumed by at least the first of any competing bids. Thus, if the initial bid is $50 million, and the break-up fee is $100,000, the next bid would have to be more than .2% over the initial bid to subsume the break-up fee. In such circumstances, it may be best to require all bidding to be in increments of .25% of the initial bid. However, the prevailing thought has been to require the first bid to be about .5% higher than the sum of the original bid and the break-up fee, and essentially to ignore the existence of the break-up fee (or impose smaller increments) thereafter.

Court approval of a retailer-liquidator agreement under section 363 of the Bankruptcy Code is usually a two-step procedure. Because time is often of the essence, and because there is a need to secure approval of the bid procedures and break-up fee before an auction is conducted, the debtor usually files a motion on very limited notice to (a) approve the bid procedures and break-up fee and (b) set a hearing to approve the store closing sales and hiring of a liquidator.

In some courts, break-up fees and auction procedures may be approved without a hearing and on limited notice to parties in interest. In others, particularly in the District of Delaware (arguably the nation's most active court for large chapter 11 cases), particularly in light of the recent decision of the United States Court of Appeals for the Third Circuit in Calpine Corp. v. O'Brien Environmental Energy, Inc. (In re O'Brien Environmental Energy, Inc.), 181 F.3d 527 (3d Cir. 1999), a hearing may be required to determine whether payment of a break-up fee may be necessary to preserve the value of the estate. In O'Brien, the third circuit rejected the traditional approach under which management's business judgment was the standard in assessing break up fees. Rather, the Court ruled that the proper standard was whether the break up fee was necessary to preserve the value of the estate, and served as a platform for enhancing bidding. As a practical matter, the Bankruptcy Court's in Delaware still grants break up fees, but debtors' lawyers are required to make a cogent justification for such break up fees.

Once bid procedures are established through the preliminary court order (or before such order, in connection with the debtor's motion), notice of the final hearing and the opportunity to make higher or better bids is then circulated to parties in interest (including landlords and governmental authorities) and other liquidation concerns which may wish to bid. These notice packages almost always include the contract between the retailer and the stalking horse liquidator; the auction procedures may require that bids be made more or less pursuant to the terms of that contract. Bidding may occur either in court or in lawyers' offices. It may be critical that a court reporter be present to transcribe the events, so as to facilitate judicial resolution of potential disputes.

Once final court approval has been received, the GOB Sale may proceed.

IV. The Law of GOB Sales in Bankruptcy and The Final Court Hearing

(a) GOB Sales are Generally Allowed. The disposition of inventory pursuant to store closing and similar liquidation sales is an accepted method for the sale of assets in bankruptcy. Bankruptcy courts have approved GOB Sales in numerous retail chapter 11 cases, including In re Hechinger Inv. Co. of Del., Inc., Case No. 99-02261 (PJW) (Bankr. D. Del.); In re Brooks Fashion Stores, Inc., 94 B 43134 (Bankr. S.D.N.Y.); In re Petrie Retail, Inc., 95 B. 44528 (AJG) (Bankr. S.D.N.Y.); In re R.H. Macy & Co., Inc., 92 B 40477 (Bankr. S.D.N.Y.); In re Best Prods., Inc., 91 B 10048 through 91 B 10053 (Bankr. S.D.N.Y.); In re Ames Department Stores, 90 B 11233 (Bankr. S.D.N.Y.); In re L.J. Hooker Corp., Inc., 89 B 11987 (TLB) (Bankr. S.D.N.Y.); In re Herman's Sporting Goods, Inc., 93 B 31529 (Bankr. D.N.J.); In re Gantos, Inc., SG 93 B 85479 (Bankr. W.D. Mich.); and In re Hills Stores Co., 91 B 10488 (Bankr. S.D.N.Y.).

(i) Majority view: Anti-GOB Sale Lease Provisions are Unenforceable in Bankruptcy. Many shopping center leases contain express prohibitions against store closing sales. The language of section 365(d)(3) of the Bankruptcy Code (requiring debtors to perform, on a postpetition basis, all obligations under nonresidential real property leases) provides a basis for the lessor to argue that these provisions are enforceable. Many courts have held, however, that such prohibitions are unenforceable in chapter 11 cases because they constitute impermissible restraints on a debtor's ability to maximize the value of its assets under section 363 of the Bankruptcy Code. See In re Ames Dep't Stores, Inc., 136 B.R. 357, 359 (Bankr. S.D.N.Y. 1992) (enforcement of anti-going-out-of-business sale clause would contravene overriding federal policy requiring debtor to maximize value of estate assets); In re Tobago Bay Trading Co., 112 B.R. 463, 466-67 (Bankr. N.D. Ga. 1990) (anti-going-out-of-business sale clause in lease unenforceable); In re Libson Shops, Inc., 24 B.R. 693, 695 (Bankr. E.D. Mo. 1982) (same).

(ii) Minority View: Anti-GOB Sale Lease Provisions are Enforceable in Bankruptcy Under Certain Circumstances. A few reported decisions uphold a lessor's right to enforce express lease prohibitions of GOB Sales, particularly when the sales would be controlled by a third-party liquidator, violate state consumer protection statutes and involve allegedly deceptive trade practices. See, e.g., In re White Crane Trading Co., Inc., 170 B.R. 694, 703 (Bankr. E.D. Cal. 1994) (if debtor intends to bring new merchandise into GOB stores, advertising GOB Sales as "bankruptcy sales," or "going out of business sales" may be considered deceptive); In re Willis Furniture Co., Inc., 148 B.R. 691, 694 (Bankr. D. Mass. 1992). In In re Antwerp Diamond, Inc., 138 B.R. 865, 867 (Bankr. N.D. Ohio 1992), the court held that GOB Sales conducted by a liquidator, in a situation where the debtor is closing all of its stores, may constitute an assignment of the store leases to the liquidator. As such, the court continued, such GOB Sales are in contravention of the provisions of section 365(b)(3)(C) of the Bankruptcy Code, which requires that assignees of shopping center leases be subject to all provisions of such leases, including prohibitions on GOB Sales. Id. Some courts have also refused to permit GOB Sales when the only beneficiary thereof is likely to be a secured creditor.

(b) Guidelines for Resolving Landlords' Concerns. At a hearing on a motion to authorize GOB Sales, landlords may appear before the bankruptcy court to argue that such sales will negatively impact their shopping malls and relations with their other tenants. These arguments may have appeal. A Bankruptcy Judge considering these arguments may face conflicting concerns: the sale may be necessary to maximize value for the debtor's estate and provide for or increase potential recoveries to unsecured creditors, thereby fulfilling essential functions of the bankruptcy process, but the court may be unwilling to ignore completely the legitimate concerns of landlords. Competent counsel will invariably work out logistical solutions to minimize the adverse impact on the landlords and malls while, at the same time, permitting the sales to proceed. The following represent some of the guidelines that have been adopted by retail debtors for conducting GOB Sales in the face of such landlord concerns:

- change "going-out-of-business" language on signs and in advertisements to softer "store closing" language;

- use professionally lettered signs;

- place "sales are final" signs at cash registers;

- agree not to solicit outside store premises (e.g., no leaflets on cars, howlhorns or sandwich boards);

- agree to restrictions on the manner in which signs are hung, including restrictions on the location, size, number and color of signs;

- appoint a person for landlords to contact to address issues or problems incident to the sale;

- agree not to conduct auctions of store fixtures at the stores (or agree that such sales be "back door" rather than "front door" sales);

- agree that the stores remain open only during the normal hours of operation set forth in the lease;

- agree to observe local "Blue Laws";

- agree that the sale not extend beyond a certain date;

- agree to vacate the stores immediately after the sale and leave them in broom clean condition;

- agree not to remodel or alter the stores;

- agree not to remove fixtures; and

- agree that, upon vacation of the stores by the debtor, the landlord be permitted to dress the store windows.

Sometimes, landlords also request that a GOB Sale not be supplemented with additional goods not already present at the store – a process called "augmentation." Because there are circumstances in which, to achieve a reasonable value for the original inventory, supplemental inventory must be brought in to the GOB Sale (e.g., shirts to sell sport jackets), reasonable protections are often negotiated. Such protections would include, for example, a requirement that any augmented goods must be of a type and quality ordinarily sold by the retailer and be priced in accordance with historic margins.

Landlords should be aware that most bankruptcy courts will grant a debtor's request to authorize GOB Sales, but debtors must be equally aware that legitimate landlord concerns exist, and that such concerns should be addressed in fair and reasonable ways. Working together, both constituencies should be able to achieve an acceptable resolution of their issues.

(c) State and Local Laws. Under certain state and local laws, outside of a chapter 11 case, there may be licensing or permitting requirements or other restrictions that would purport to limit or restrict the conduct of a GOB Sale. In a chapter 11 GOB Sale, however, these state and local laws largely are not applicable. As a practical matter, the state and local regulations or requirements that are problematic or burdensome for the liquidator are (a) time limits, (b) inability to transfer goods among stores, (c) obtaining licenses from various state and local authorities in a multi-jurisdictional GOB Sale, (d) inability to supplement the GOB Sale with additional goods, and (e) certain signage or banner restrictions. As a matter of practice, the Bankruptcy Court order addresses these issues and does not require strict compliance with state and local laws.

As a preliminary matter, the vast majority of GOB Sale statutes and regulations are not, by their express terms, applicable if the GOB Sale is conducted "pursuant to an order or process of a court of competent jurisdiction." See, e.g. Pennsylvania St. 53 § 4471-5(a)(1). A Bankruptcy Court is such a court of competent jurisdiction and, accordingly, state regulatory statutes are not applicable to GOB Sales in bankruptcy. The Bankruptcy Court may authorize the conduct of GOB Sales that do not strictly comply with the statutes.

Moreover, even when such a clear exemption does not exist, courts have held that U.S.C. § 959(b), (which generally requires a debtor in possession to abide by state laws) does not apply to debtors or their agents liquidating assets. See, e.g. California State Bd. of Equalization v. Goggin, F.2d (9th Cir. 1951) (28 U.S.C. § 959 does not apply to transactions that are in the nature of a liquidation), cert. denied, 342 U.S. 909 (1952); see also In re Borne Chemical Co., Inc., 54 B.R. 126, 135 (Bankr. D.N.J. 1984) (holding that 28 U.S.C. § 959(b) is applicable only where the property is being managed or operated for the purpose of continuing operations); but cf. In re White Crane Trading Co., Inc., 170 B.R. 694, 702-704 (Bankr. E.D. Cal. 1994) (noting that at juncture where the debtors introduce new merchandise, prolong going-out-of-business sales for unlimited duration, and mislead public with false advertising, state consumer protection laws become significant); In re Lauriat's, Inc., 219 B.R. 648, 649 (Bankr. D. Mass. 1998) (holding that statutory construction does not permit waiver of 28 U.S.C. § 959(b)).

It is a critical part of the statutory construct of section 363 of the Bankruptcy Code that debtors operate their businesses to maximize recovery to its creditors. This goal can be hampered if the debtor is required to strictly adhere to state and local statutes. That said, in conducting a GOB Sale in bankruptcy, the debtor, must tell the truth, have all advertising fairly describe the GOB Sale and not violate regulations affecting public safety. Where the debtor conducts a GOB Sale in this manner, with the knowledge and oversight of a Bankruptcy Court, there should be no harm to any entity.

In addition, Bankruptcy Courts have recognized that federal bankruptcy law preempts state and local laws which contravene the underlying policies of the Bankruptcy Code. See, e.g., In re Shenango Group, Inc., 186 B.R. 623, 628 (Bankr. W.D. Pa. 1995) ("Trustees and debtors-in-possession have unique fiduciary and legal obligations pursuant to the bankruptcy code… [A] state statute [] cannot place burdens on them where the result would contradict the priorities established by the federal bankruptcy code."). while preemption of state law is not always appropriate, see In re Baker & Drake, 35 F.3d 1348, 1353-54 (9th Cid. 1994) (no preemption where state law prohibiting taxicab leasing was promulgated in part as a public safety measure), it is appropriate where, as in

connection with a GOB Sale, the only state laws involved concern economic regulation rather than the protection of public health and safety. Id. At 1353 (cases suggest that "federal bankruptcy preemption is more likely…where a state statute is concerned with economic regulation rather than with protecting the public health and safety").

It is significant that the Bankruptcy Code, in many instances, trumps state law. For example:

- Section 1146(c) of the Bankruptcy Code exempts debtors from paying certain stamp and similar taxes;
- Section 502(b)(6) of the Bankruptcy Code caps a landlord's state law claim for damages upon lease rejection;
- Section 1126 of the Bankruptcy Code overrides state law contract rights in binding parties without their consent;
- Section 502(b) of the Bankruptcy Code stops the accrual of interest on unsecured or undersecured debt notwithstanding state law contract rights permitting such accrual; and
- Section 365 of the Bankruptcy Code negates contractual provisions which offend the rehabilitation goals of the Bankruptcy Code.

Recently, however, Attorneys General have been more vocal about compliance with state law. Armed with the Supreme Court's decision in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), they say that a Bankruptcy Court simply does not have the power to enjoin enforcement of state laws. They take this position, notwithstanding that, in most instances, the state statutes are simply not applicable. To address the Attorneys General concerns, orders have been drawn to make clear that they do not constitute a general waiver of all state and local laws applicable to the GOB Sale. Rather, the orders generally provide that (a) the conduct of the GOB Sale will be without the necessity of, and the delay associated with, obtaining various state licenses or permits and observing state and local waiting periods or time limits, (b) the debtor may advertise the Sale as a store closing or similar type sale, (c) the debtor may transfer merchandise between the stores and supplement the GOB Sale with goods of the same type and quality and with margins as historically existed; (d) bulk sales laws, to the extent applicable, are deemed inapplicable, (e) the GOB Sale will be conducted in compliance with remaining statutes and regulations, such as health and safety laws, (f) the GOB Sale will be conducted for a discrete period of time, and (g) the GOB Sale will be conducted in accordance with the agency agreement and will remain subject to the jurisdiction of the Bankruptcy Court. In this way, with relief narrowly tailored, the interests of the debtor and the Attorneys General are protected.

Please note that additional hot buttons, such as the manner in which gift certificates and store credits are treated, are addressed on a case by case basis.

(d) The Court Order. A court order approving a GOB Sale usually provides, among other things, for (a) approval of the agency agreement between the debtor and the liquidator, (b) authority for the liquidator to sell the goods free and clear of liens (with such liens, if any, generally attaching to the guaranteed return received by the debtor), and (c) authority to conduct the store closing sales notwithstanding (i) any language in the relevant leases that purports to limit such sales and (ii) noncompliance with state and local licensing requirements and bulk sales laws (narrowly tailored as set forth above). As noted, many state and local statutes regulating such sales are not applicable, by their terms, if a sale is conducted under the authority of a court of competent jurisdiction. Accordingly, it might seem that language in a court order obviating state and local licensing requirements and the like is unnecessary. From the liquidator's perspective, however, that is not true. A court order with this language permits supervisors at the store level to show sheriffs and other municipal and state officers a simple document giving them the authority to conduct the sale. As a practical matter, this may be extremely helpful.

(e) Operating the Sale. Almost immediately after the court order is entered, the liquidator may take over the operation of the stores, and the retailer is free to focus on its remaining business. All day-to-day operating responsibility for the relevant stores may be in the hands of the liquidator. But, because the liquidator is only the agent for the retailer, it must abide by such things as the terms of the retailer's employee manual and lease covenants related to such things as mall operating hours (unless altered by the order). The liquidator, though, may decide on all discounting and advertising and be in charge of the stores during the sale.

In a guaranteed return scenario, the retailer is often paid a percentage of the guaranteed return within two days of the entry of the Court order. In such cases, the agreement may provide that, upon making this initial payment, the liquidator (a) obtains a first priority security interest in the inventory at the stores and proceeds of its sale, subject only to its obligation to pay the balance of the guaranteed amount, and (b) sets up bank accounts and controls all proceeds of the sale. Working out the details of this relatively straightforward arrangement with existing secured lenders is absolutely critical, as such lenders often have a first lien on all inventory of the debtors, and their consent may be necessary.

Once the transaction is approved, a third-party inventory service, under the joint guidance of the retailer and the liquidator, counts the inventory. When the count is completed and reconciled, the balance of the guaranteed return may be calculated and paid.

Finally, the liquidator signs, banners and advertises the sale and, hopefully from its point of view, sells the inventory to consumers for more, in the aggregate, than the sum of the guaranteed return and the liquidator's expenses.

V. Disposing of a Retailer's Leases

(a) Overview. As a practical matter, section 365 of the Bankruptcy Code gives a retailer something it did not have outside of bankruptcy – that is, the ability to reject unwanted leases or assume and assign leases to third parties notwithstanding prohibitions or restrictions in the leases on such assignment. These powers are among the most valuable provided to a retail debtor in a chapter 11 case.

Outside of bankruptcy, a retailer that desires to close stores has limited options. The retailer can reach accords with its landlords, or breach the leases and face litigation unless it provides the landlords with replacement tenants. A replacement tenant, however, under virtually all form leases, must be approved by the landlord. Accordingly, landlords have tremendous leverage in lease termination negotiations, and the cost and expense incident to closing stores outside of bankruptcy can be enormous.

The Bankruptcy Code provides tenants with an alternative than is often less costly. In bankruptcy, the debtor has the unique power to reject unexpired leases. Rejection is the court-authorized breach of an executory contract or unexpired lease. Most significant, however, in this context, may be the Bankruptcy Code's cap on the damage claims of landlords incident to lease rejection.

Under section 502(b)(6) of the Bankruptcy Code, a landlord's damages for termination of a real property lease are limited to the greater of (a) one year's rent or (b) 15% of the rent for the remainder of the lease term, not to exceed three years' rent. Each of these amounts is measured as of the earlier of the commencement of the bankruptcy case or the repossession by, or surrender of the property to, the landlord. Accordingly, if the remaining term of the lease is eighty (80) months (six years, eight months), or less, the landlord's damages may be limited to one year's rent; if the lease has more than eighty months remaining, such damages may be capped at the lesser of the rent for 15% of the remaining lease term, or three years' rent.[2]

It is also important to note that the section 502(b)(6) lease termination damages cap is calculated "without acceleration." This is a reference to the fact that almost all modern leases contain as what are known as acceleration clauses. These clauses generally permit the landlord, after a default, to make all amounts due and payable under the lease through the conclusion of the lease immediately due and payable. Thus, outside of bankruptcy, a retailer breaching a lease risks liability for all rent remaining under the lease. What may be worse is that in certain jurisdictions, the landlord has no duty to mitigate damages. That is, the landlord does not have to attempt to find a replacement tenant to offset some of the liabilities of the original tenant. However, whatever the amount of a landlord's claim based on rejection of a lease, because such claims are generally treated as general unsecured claims in the debtor's bankruptcy case, the landlord will likely receive less than full recover on the amount of its claim.

In chapter 11, there is also the ability to centralize the determination of lease damage claims in one forum — the bankruptcy court. Outside of bankruptcy, a retailer attempting to close numerous stores at once may have to respond to litigation throughout the country and face enormous defense costs incident thereto.

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[2] Courts are divided as to whether the 15% calculation is based on the amount of time, or the amount of rent, remaining under the lease. Compare In re Gantos, 176 B.R. 793 (Bankr. W.D. Mich 1995) (15% applies to the remaining rent due under the lease); In re Farley, Inc., 146 B.R. 739, 745-47 (Bankr. N.D. Ill. 1992) (same); with In re Iron-Oak Supply Corp., 169 B.R. 414 (Bankr. E.D. Cal. 1994) (15% applies to the remaining term of the lease); Sunbeam-Oster Co. v. Lincoln Liberty Avenue, Inc. (In re Allegheny Int'l Inc.), 145 B.R. 823 (W.D. Pa. 1992) (same).

An additional bankruptcy-related benefit relates to the fact that most modern leases also have anti-assignment provisions. Under these provisions, even if the retailer identifies a prospective assignee for a lease, the retailer may not be able to assign the lease absent the landlord's consent. Under section 365(f)(1) of the Bankruptcy Code, however, the retailer has the power to assume and assign leases to third parties notwithstanding the existence of anti-assignment provisions.

In addition, lease clauses prohibiting a store from "going dark" may not be enforceable, under certain circumstances, in bankruptcy. See, e.g., In re R.H. Macy & Co., Inc., 170 B.R. 69 (Bankr. S.D.N.Y. 1994) (covenant to operate continuously does not create an "obligation" enforceable under § 365(d)(3); enforcement of such covenant in bankruptcy would conflict with ability to reorganize); In re Connellsville Plaza v. Jiffy Foods Corp., 92 B.R. 136, 138 (W.D. Pa. 1988) (in context of assumption and assignment, vacancy in property held not a breach of lease); In re Food City, Inc., 95 B.R. 451 (Bankr. W.D. Tex. 1988) (lease clause stating that "black out" entitled landlord to $250,000 penalty not enforceable).

The decision to assume or reject leases for stores in which GOB Sales are conducted should be made, if at all possible, during the sales, when the stores are still being operated and a third party liquidator is bearing the costs. As a matter of practice, a real estate consultant may summarize the leases and send out summaries to prospective assignees that may be interested in the size and type of store at issue. Thereafter, an auction may be held to actually sell off the leases that have value to prospective assignees. This can all occur while the GOB Sales are taking place. Leases that are over-market or otherwise not assignable may be rejected by the debtor at the conclusion of such sales.

(b) General Standards for Assumptions. As a practical matter, a debtor elects to assume leases when they are required for the ongoing business or when they are valuable to a third-party. They can be valuable when there is equity in the lease – that is, when the rent reserved under the lease is below market or when there is perceived value for a similar type of store to take over a location, e.g., where Oshman's Sporting Goods takes over a SportsTown sporting good store, the consumer is still able to go to the corner of Elm and Main to buy basketball shoes. If there has been a default prior to an assumption of a lease (almost always the case), the adequate assurance requirement of 365(b), is applicable. These requirements, inter alia, require prompt payments of all rent including related charges, both prepetition and postpetition. If no default has occurred under an unexpired lease, the Bankruptcy Code sets forth no standard for assumption. See In re Perretta, 7 B.R. 103 (Bankr. N.D. Ill. 1980)[3] If there is a default (which there almost always is), the debtor has the burden to show that the proposed assumption meets all of the requirements of 11 U.S.C. §365(b). See In re Rachels Industries, Inc., 109 B.R. 797 (Bankr. W.D. Tenn. 1990). Section 365(b)(1) prohibits a debtor from assuming a lease unless the debtor (i) provides adequate assurance it will promptly cure all defaults, (ii) provides adequate assurance that it will compensate the landlord for any actual pecuniary loss resulting from such defaults and (iii) provides adequate assurance of future performance under such lease.

[3] But see In re Currivan's Chapel of the Sunset, 51 B.R. 217 (N.D. Cal. 1985) (requiring adequate assurance even if lease not in default if there is reasonable concern that debtor will not be able to timely perform its obligations going forward.)

(i) Adequate Assurance of Future Performance. There is a plethora of cases interpreting the requirements of 11 U.S.C §365(b). See, e.g., In re Rachels Industries, Inc. 109 B.R. 77 (Bankr. W. D. Tenn 1990); Enfield Trust Associates, Inc. v. World Skating Center, Inc. In re World Skating Center, Inc.) 100 B.R. 147 (Bankr. D. Conn. 1989); In re THW Enterprises, Inc., 89 B.R. 351, 357 (Bankr. S.D.N.Y. 1988) (citing Richmond Leasing Co. vs. Capital Bank, N.A., 762 F.2d 1303, 1310 (5th Cir.1985)); In re Memphis-Friday's Associates, 88 B.R. 830 (Bankr. W.D. Tenn 1988); In re Westview 74th Street Drug Corp., 59 B.R. 747, 754 (Bankr. S.D.N.Y 1986); In re R.H. Neil, Inc., 58 B.R. 969, 971 (Bankr. S.D.N.Y. 1986); In re Natco Industries, Inc., 54 B.R. 436 (Bankr. S.D.N.Y. 1985). A review of these cases suggests that while "adequate assurance of future performance" does not necessarily include a guaranty that Debtor will thrive and make a profit, it does require that Debtor provide non-speculative evidence relevant to each of the requirements of 11 U.S.C. §365(b)(1) and (b)(3).

The meaning of "adequate assurance of future performance" depends on the facts and circumstances of each case, but should be given "practical, pragmatic construction." See, Carlisle Homes, Inc. v. Azzari (In re Carlisle Homes, Inc.), 103 B.R. 524, 538 (Bankr. D. N.J. 1989); see also In re Natco Industries, Inc., 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985) (adequate assurance of future performance does not mean an absolute assurance that debtor will thrive and pay rent); In re Bon Ton Restaurant & Pastry Shop, Inc., 53 B.R. 789, 803 (Bankr. N.D. Ill 1985) ("[a]lthough no single solution will satisfy every case, the required assurance will fall considerably short of an absolute guarantee of performance"). Among other things, adequate assurance may be given by demonstrating the assignee's financial health and experience in managing the type of enterprise or property assigned. Accord In re Bygaph, Inc., 56 B.R. 596, 605-06 (Bankr. S.D.N.Y 1986) (adequate assurance of future performance is present when prospective assignee of lease from debtor has financial resources and has expressed willingness to devote sufficient funding to the business to give it strong likelihood of succeeding; chief determinant of adequate assurance is whether rent will be paid.) Compare In re Future Growth Enterprises, Inc., 61 B.R. 469 (Bankr. E.D. Pa 1986) (where the debtor proposes to cure it default by the payment of money over a period of time, but the debtor's financial reports indicate that it is unlikely that there will be sufficient cash to fulfill its obligations, the debtor has not given adequate assurance under the Code.)

The granting of security has been held sufficient to constitute adequate assurance of future performance in a number of cases. See, e.g., In re West View 74th Street Drug Corp., 59 B.R. (Bankr. S.D.N.Y. 1986) (a security deposit may constitute adequate assurance); In re Alipat, Inc., 36 B.R. 274 (Bankr. E.D. Mo 1984) (a letter of credit may constitute adequate assurance); In re Peterson's Ltd., 31 B.R. 524 (Bankr. S.D.N.Y. 1983) (a certificate of deposit may constitute adequate assurance).

(ii) Prompt Cure. An issue often arises regarding the timing and method of the "prompt cure" of existing defaults. The nature of the default, remaining term of the lease and security to be provided to guaranty the cure are some of the factors to be considered. See In re Coors of North Mississippi, Inc., 27 B.R. 918 (Bankr. N.D. Miss. 1983), which held that (curing of a default of approximately $110,000.00 over a 3 year period was "prompt" under the circumstance of the case); In re Bon Ton Restaurant and Pastry Shop, Inc., 53 B.R. 789 (Bankr. N.D. Ill 1985) (90 day period to

cure found to be "prompt" under the totality of the circumstances). Cf. Seidle v. Pan America World Airlines, Inc. (In re Belize Airways, Ltd.), 5 B.R. 152 (Bankr. S. D. Fla. 1980) (prompt cure required payment within 15 days of final assumption order). Payment of the arrearages over a 5 year period, which was virtually coextensive with the term of the lease, was not a "prompt cure." In re R/P International Technologies, Inc., 14 Bankr. Ct. Dec. 106 (Bankr. S.D. Ohio 1985) In In re Gold Standard at Penn, Inc., 75 B.R. 669 (Bankr. E.D. Pa. 1987) the court found, basically on a proof of financial condition issue, that the debtor would not effectuate a "prompt cure."

(iii) Payment of Attorneys' Fees. Generally, if the subject lease provides for attorneys' fee in the enforcement of the provisions thereof (i.e., in compelling the payment of the rent due), the only question before the court is the reasonableness of these fees, and not the issue of entitlement. In re Ribs of Greenwich Village, 57 B.R. 319 (Bankr. S.D.N.Y. 1986). See also, In re Narragansett Clothing Co., 119 B.R. 388 (Bankr. D.R.I. 1990); In re Westview 74th Street Drug Corp., 59 B.R. 747 (Bankr. S.D.N.Y. 1986); In re J.W. Mays, Inc., 30 B.R. 769 (Bankr. S.D.N.Y 1983); In re Bullock, 17 B.R 438 (Bankr. 9th Cir. 1982). Indeed, it has also been held that a creditor is entitled under §365 itself to attorneys' fees as part of the cure and assumption of a contract, without considering whether there is a contractual obligation to pay the fees. See e.g. In re Foreign Crating, Inc., 55 B.R. 53 (E.D. N.Y., 1985).

The terms of the lease, not the provisions of section 365, generally decide the issue of whether the landlord is entitled to payment by the debtor of the landlord's attorney fees incurred in connection with curing the debtor's defaults under the lease upon assumption. The majority view is that, although section 365(b)(1) provides that the debtor must compensate the landlord for actual pecuniary loss resulting from the debtor's default, it grants landlords no explicit, independent right to attorney fees. If the lease does not provide for the debtor's payment of the landlord's attorney fees, therefore, attorney fees will not be awarded. See In re Westside Printing Works, Inc., 180 B.R. 557, 563-64 (9th Cir. BAP 1195) (landlord not entitled to attorney fees where lease did not provide for the payment of landlord's attorney fees); In re F & N Acquisition Corp., 152 B.R 304, 308 (Bankr. W.D. Wash. 1993) (where lease provided that each party is responsible for its own attorney fees, landlord could not assert an independent right to payment of such fees by the debtor under section 365(b)(1(B)); In re Ryan's Subs, Inc., 165 B.R. (Bankr. W.D. Mo. 1994) (the lease determined the latitude and scope of the landlord's right to recover its attorney fees). Contra In re Foreign Crating Inc., 55 B.R. 53 (Bankr. E.D.N.Y. 1985).

(iv) Interest and Late Charges. It has been regularly held that landlords are entitled to the payment of interest and late charges on the delinquent rent. It has been held that as long as the operative document provides for the payment of interest and/or late charges then the only issue for the Court to decide is the reasonableness of these charges. See, e.g., In re Melbelle Associates, Inc., 99 B.R. 31 (Bankr. E.D. Cal 1989) (holding that late charges of four per cent (4%) and interest at 9.75% was reasonable); In re Westview 74th Street Drug, 59 B.R. 747 (Bankr. S.D.N.Y. 1986); In re Diamond head Emporium, Inc., 69 B.R. 487 (Bankr. D. Haw. 1987) and In Re Joshua Slocum, Ltd. 103 B.R. 601 (Bankr. E.D. Pa., 1989). If the lese or state law provides, interest should be paid. See In re Westview 74th Street Drug, 59 B. R. 747 (Bankr. S.D.N.Y. 1986). See In re Eagle Bus Mfg., Inc., 148 B.R 481 (Bankr. S. D. Tex. 1992) (if neither lease nor state law requires payment of interest, debtor need not pay interest to cure defaults).

(c) Assignment. Under the Bankruptcy Code, a debtor essentially has an asset that it did not have prior to bankruptcy. Anti-assignment provisions are generally enforceable out of bankruptcy but not enforceable in bankruptcy. Accordingly, if an assignment of a lease requires a landlord's consent, and there is equity in the lease, the lessor rather than the debtor would realize that equity. In bankruptcy, however, the court can override anti-assignment clauses and the debtor can realize the value.

Courts have held that section 365(f) renders "assignment fees" or "rent sharing" provisions unenforceable in bankruptcy, even though they may be valid under applicable state law. Section 365(f)(1) nullifies any provision in a lease that places a condition upon its assignment.[4] See South Coast Plaza v. Standor Jewelers West, Inc. (In re Standor Jewelers West, Inc.), 129 B.R. 200, 201-02 (9th Cir. BAP 1991) (holding that section 365(f) and the rehabilitative policies of the Bankruptcy Code require the invalidation of an assignment fee provision); see also In re National Sugar Refining Co., 21 B.R. 196, 198 (Bankr. S.D.N.Y. 1982) (lease provision granting landlord a right of first refusal as to the assignment of the lease and, if assignment to the landlord is refused, the right to request the profits realized from an assignment applied only to consensual assignment, not to assignment under bankruptcy law).

An authorized assignment by the Debtor will relieve the Debtor from prospective liability for any breach of the lease occurring after assignment, irrespective of the provisions contained in the lease. 11 U.S.C. §365(k).

(d) Standards for Assumption and Assignment of Shopping Center Leases. In addition to meeting all the requirements of section 365(b)(1) of the Bankruptcy Code set forth above, debtors seeking to assume and assign leases in shopping centers must comply with the heightened standards for adequate assurance found in section 365(b)(3).

Section 365(b)(3)(A) requires that the financial standing of a proposed assignee must be similar to that of the original tenant as of the date that the lease was executed and may provide for a security deposit to be furnished. Query: if a mega-retailer as Federated has a huge net worth on the date a lease is executed and no retailer today can match that net worth, can the lease be assigned

Section 365(b)(3)(B) requires that there be no substantial decline in percentage rent. This requirement will obviously be subject to speculative testimony.

Section 365(b)(3)(C) makes clear that the assumption and assignment of a shopping center lease is subject to all the provisions of that lease including, without limitation, radius, location, use and exclusivity provisions, and will not breach any provision contained in any other lease, financing agreement or master agreement relating to the shopping center. But see, In re Tech Hifi, Inc., 49 B.R. 876, 879-90 (Banrk. D. Mass. 1985), (variance in use would be permitted where it did not harm the overall image of the shopping center or jeopardize landlord's bargain.)

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[4] However, section 365c)(1) states that a debtor may not assume or assign a lease if applicable law excuses the landlord from rendering performance to an entity other than the debtor and the landlord does not consent to the assumption or assignment. 11 U.S.C. § 365(c)(1). See In re Lile, 103 B.R. 830 (Bankr. S.D. Tex. 1989).

Section 365(b)(3)(D) focuses on maintaining both the tenant mix and balance in a shopping center upon assignment of a lease by a bankruptcy tenant. The term "mix" implies that issues will focus on the inclusion or exclusion of a store in the array or mix of malls, and the term "balance" implies issues focusing on location and relationship of tenants in the mix of mall stores. See In re Federated Dept. Stores, Inc., 135 B.R. 941, 943 (Bankr. S.D. Ohio 1991). Although a plain reading of the language of the statute (i.e., 365(b)(3)(C) and 365(b)(3)(D)) appears to make this requirement independent of the language of the lease, some courts have refused to consider tenant mix unless the proposed use will be inconsistent with express language of the lease. See In re Ames Department Stores, 121 B.R. 160, 164-65 (Bankr. S.D.N.Y. 1990) (section 356(b)(3)(D)'s protection of tenant mix extends so far as contractual provisions regarding use rather than general notions of tenant mix).

(e) The False Controversy Regarding Designation Rights. As discussed above, in Chapter 11, the retail debtor has the unique ability to sell and assign its leases to third parties for value, notwithstanding provisions in the leases that would prohibit the sale or assignment, so long as the debtor complies with section 365 of the Bankruptcy Code. But to sell leases takes time and, directly related to time, money. Accordingly, financially strapped debtors may not have the wherewithal to obtain the value from the leases that exists. Moreover, landlords know that they can get their properties back by "waiting the debtor out" and, thus, do not offer any value for below market leases.

Real estate experts have stepped into the fold created by the above described situation. And what they have done is offer to act as agent for the debtor, pay the carrying costs, market and sell the leases and share the upside they create. The deals are structured in a variety of ways, the most common of which is to guarantee a sum of money to the estate, and after this amount has been repaid, plus expenses and a reasonable fee to the real estate expert, all proceeds thereafter are shared.

These transactions, where the right to designate assignees for the debtor's leases is shifted to a third party are called designation rights transactions. They are vehemently opposed by landlords, as the balance of power is shifted from the financially challenged debtor to a financially strong entity – the real estate expert. Landlords have argued that you can't transfer the right to designate, and that nothing in the Bankruptcy Code permits a debtor to do so. The one reported case, In re Ernst Home Centers, Inc. 209 B.R.824 (Bankr. W.D. Wash 1997) held that this was acceptable. But on a more base level, no rights of landlords are impacted by the designation rights transaction. All the protections of section 365 still exist. For example, rent must continue to be paid on a timely basis. Most significant, when the time comes to assume the lease, the debtor must still meet the "cure and assure" provisions discussed above. The bottom line is that all the rights to which Congress thought the landlords ought to be entitled are preserved. The economic balance of power, however, has shifted for the benefit of the debtor and all of its creditors.