

**THE DISAPPEARANCE OF RETAIL REORGANIZATIONS  
UNDER THE AMENDED SECTION 365(d)(4)**

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“Circuit City, Eddie Bauer, Boscov’s, Borders, and Beyond:  
Is Chapter 11 Bankruptcy Working for Retailers?”

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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.*<sup>2</sup>

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.<sup>3</sup>

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 roughly 10 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 retailers used the significant powers and protections of the Chapter 11 process to resuscitate their businesses.<sup>4</sup>

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<sup>1</sup> Lawrence C. Gottlieb is the former Chair of the Bankruptcy & Restructuring Group of Cooley LLP. The Cooley Bankruptcy & Restructuring group has played significant roles in some of the largest retail bankruptcies and out of court restructuring cases. Cooley represents and has represented official committees of unsecured creditors in such cases as Montgomery Ward, Federated Department Stores, Hancock Fabrics, Mervyn’s, Eddie Bauer, Boscov’s, Goody’s, Gottschalks, Athlete’s Foot, Footstar, The Bombay Company, Florsheim Shoes, Sharper Image, and Levitz Home Furnishings, among many others. Cooley also served as counsel to Crabtree & Evelyn, one of only a handful of retailers since the implementation of the 2005 bankruptcy amendments to emerge successfully as an unimpaired reorganized entity. Mr. Gottlieb has authored numerous published articles on various retail bankruptcy issues, including the effects of the 2005 amendments on retail reorganization. Mr. Gottlieb has also testified before the House Judiciary Committee on the effects of BAPCPA.

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

<sup>3</sup> *Id.*

<sup>4</sup> 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

Today, retailers almost invariably begin the Chapter 11 process with little hope of emerging as a standalone entity. Numerous economic factors—including capital constraints, competition from online and discount retailers, and weak consumer demand—have clearly contributed to this downward spiral (particularly during the height of the recent recession), however, to pin the disappearance of retail reorganization solely on one or more of these economic factors would be to ignore the devastation wrought by the amendment under BAPCPA’s amendment to the provisions of the Bankruptcy Code concerning a debtor’s deadline to assume or reject unexpired leases of nonresidential property.

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 their 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.” The Bankruptcy Code placed no limit on the duration or number of extensions that could be sought, and extensions were routinely granted by courts presiding over mid-size and larger cases, where the requesting debtor was continuing to perform its lease obligations.

BAPCPA revised 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) 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 revisions to 365(d)(4) were designed to provide a “firm, bright line deadline” on a debtor’s ability to assume or reject its leases,<sup>5</sup> regardless of the individualized challenges facing a debtor.

The deadline established under BAPCPA for a debtor to assume or reject unexpired leases of nonresidential property has had a substantial and unfortunate affect on retailers’ ability to meet liquidity needs and obtain extended postpetition financing—the lynchpin to any successful retail reorganization effort. Now, more than 7 years removed from the enactment of BAPCPA and having observed its impact on numerous retail Chapter 11 cases, I can objectively say that BAPCPA has negatively impacted a retailer’s ability to meet its liquidity needs in Chapter 11 irrespective of the other factors driving a lender’s decision to provide postpetition financing. Indeed, as can be seen from the attached chart summarizing 20 of the largest retail bankruptcy cases since BAPCPA, the vast majority of retail chapter 11 filings end in liquidation or a quick sale under section 363 of the Bankruptcy Code. The liquidation of Circuit City and Linens ’n Things alone resulted in more than 50,000 lost jobs.

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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.

<sup>5</sup> H.R. Rep. No. 109-31, pt. 1, at 86 (2005) *reprinted in* 2005 U.S.C.C.A.N. 152–53.

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. Most retailers contemplating a Chapter 11 filing have experienced sustained periods of liquidity problems and have therefore relied on the secured lending of banks and other financiers for years preceding their bankruptcy filings.<sup>6</sup> Consequently, at the 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. 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 of the Bankruptcy Code. Unfortunately, the revision to section 365(d)(4) of the Bankruptcy Code under BAPCPA has made it significantly more difficult for a lender to have confidence in a retail debtor's ability to reorganize in a timely manner.

From a lender's perspective, a retailer's ability to routinely obtain extensions of the lease assumption/rejection period provided three 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 assured that the value of a debtor's commercial lease could be monetized in the event of a failed reorganization because debtors had an indefinite period of time to assign below-market commercial leases to third parties at a premium.
- Third, 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.

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<sup>6</sup> The growth of the second lien lending market over the past decade 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 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 lenders, in contrast to mezzanine lenders, invariably play an active role in the Chapter 11 process because, in the event of a borrower default, the second lien lender 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.

Although all three protections play important roles in a lender's decision to provide financing, it is the latter protection which is most crucial. A lender's willingness to permit the use of its collateral and/or provide postpetition financing to a retailer is in large part based on the value of the retailer's inventory at a GOB sale. 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, and the lender's recovery may not fulfill its expectations. This issue is exacerbated for lenders because they do not have control over a debtor's decisions to assume or reject unexpired leases.

Accordingly, prepetition lenders use their substantial leverage to ensure that a retail debtor will be able to conduct a GOB sale. However, GOB sales must be planned, approved by the Bankruptcy Court (after parties in interest are provided with sufficient notice), and conducted in manner that maximizes value. All told, preparing and conducting a GOB sale takes at least 120-days in most cases. The 210-day limit set by BAPCPA therefore leaves a debtor with less than three months after the commencement of its case before GOB sales must be implemented.

As a result, most prepetition lenders now refuse to provide any more postpetition financing than necessary to fund an immediate sale or liquidation process. This is particularly problematic because retailers that file for Chapter 11 protection today increasingly have balance sheets that are encumbered by ever growing amounts of secured debt, and there is therefore virtually no ability for retailers to survive on cash collateral alone. Due to the modern retailer's capital structure, prepetition lenders have all of the bargaining power, and the result is that most postpetition financing facilities either (i) expire within the first few months of the case, (ii) include "milestones" or "trigger notices" requiring the Debtors' to follow a strict path towards liquidation or a sale, (iii) include substantial reductions in the advance rate as the case extends beyond a certain length, or (iv) employ some combination of the above. These provisions give lenders certainty that a liquidation sale will occur and be concluded before the expiration of the 210-day period provided for debtors to assume or reject leases.

Lenders are simply not willing to bear the risks associated with reorganization for fear that the retailer may lose its store leases before a GOB sale is completed. The decision not to provide reorganization financing is made by secured lenders before the debtor files for bankruptcy. This is why it is illusory for creditors or landlords to believe that they will have any influence on whether a debtor will obtain sufficient postpetition financing to conduct a reorganization.

Unsurprisingly then, retail cases filed over the past 7 years have invariably taken one of two forms: either the case is filed as a liquidation, a quick sale under Section 363 of the Bankruptcy Code, 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, particularly because 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. Furthermore, the 210-day period does not provide a debtor sufficient time to exploit many of the tools provided by chapter 11 to assist the debtor's rehabilitation. 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.

The end result is that retailers simply do not reorganize unless their prepetition lender is interested in owning the company or supporting a reorganization for some other unique reason. Appended to this testimony is a chart summarizing 20 of the largest retail bankruptcy cases since BAPCPA.<sup>7</sup> These cases demonstrate just how hobbled the chapter 11 process for retailers has become. Specifically:

- Only 1 out of the 20 cases extended beyond 210 days, and that was 2011 bankruptcy of Syms and Filene's Basement. In that case, the Debtors liquidated substantially all of their assets (other than their owned real estate assets) within the first two months of the proceeding. The cases only continued so the Debtors could liquidate their real estate assets.
- The average Retail Debtor either liquidated, sold substantially all of its assets, or obtained approval of a plan of reorganization in little more than **3 months**.
- 10 of the 20 Retail Debtors liquidated.
- 7 of the 20 Retail Debtors sold substantially all of their assets under section 363 of the Bankruptcy Code. At least two of the purchasers of these 7 Retail Debtors would subsequently file for bankruptcy and liquidate.
- 3 of the 20 Retail Debtors reorganized. In each of these cases, the Retail Debtors' prepetition secured lender either accepted equity in exchange for the cancelling of its debt or was also a prepetition equity holder of the debtor.
- The average recovery for general unsecured creditors of the Retail Debtors was between 10 and 20%.

For the reasons explained above, these results are entirely understandable and predictable in a post-BAPCPA world. 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. The fixing of an immutable deadline for the assumption or rejection of commercial real estate leases has dealt a knockout blow to prospective retail reorganizations.

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<sup>7</sup> The retail debtors (the "Retail Debtors") included in the chart are: Blockbuster, Borders, Boscov's, Circuit City, Crabtree & Evelyn, Eddie Bauer, Finlay Enterprises, Goody's, Gottschalks, Harry & David, Hub Holdings, Linens 'n Things, Loehmann's, Movie Gallery, Ritz Camera Centers, Sharper Image, Steve & Barry's, Syms/Filene's Basement, the Bombay Company, and United Retail Group.

Appendix to *The Disappearance of Retail Reorganization Under the Amended Section 365(d)(4)*  
 Written testimony of L. Gottlieb for the ABI Commission to Study the Reform of Chapter 11

| Case Name                               | Disposition    | Petition Date | Sale / Reorganization Date | Ch. 11 Reorganization Period | GUC Creditor Recovery   | Discussion  |
|---|----------------|---------------|----------------------------|------------------------------|-------------------------|---|
| Blockbuster (10-14997) (S.D.N.Y.)       | 363 Sale       | 9/23/2010     | 4/14/2011 <sup>1</sup>     | 203 days                     | 0%                      | While the case is still pending, it is unlikely that there will be any distribution to creditors because the proceeds generated by the sale of the Debtors' assets did not exceed the Debtors' secured indebtedness and no assets were carved out of the secured lenders' collateral for the benefit of general unsecured creditors. Blockbuster's assets were sold to the DISH Network Corporation after an auction where the Debtors' prepetition secured lenders also bid for the Debtors' assets. |
| Borders (No. 11-10614) (S.D.N.Y.)       | Liquidation    | 2/16/2011     | 7/21/2011 <sup>2</sup>     | 155 Days                     | 4-10% <sup>3</sup>      | After an unsuccessful auction for substantially all of the Debtors' assets, Borders was liquidated by Hilco and other liquidators.  |
| Boscov's (No. 08-11637) (Del.)          | 363 Sale       | 8/4/2008      | 11/21/2008 <sup>4</sup>    | 109 days                     | 6.4-15.74% <sup>5</sup> | The winning bidder was an affiliate of the prepetition owners.  |
| Circuit City (No. 08-35653) (E.D. Va.)  | Liquidation    | 11/10/2008    | 1/16/2009 <sup>6</sup>     | 67 days                      | 10-32% <sup>7</sup>     | Auction for substantially all of the Debtors' assets held days after disappointing holiday season produced no going concern bids.   |
| Crabtree & Evelyn (09-14267) (S.D.N.Y.) | Reorganization | 11/17/2009    | 1/13/2010 <sup>8</sup>     | 57 days                      | 45% <sup>9</sup>        | The Debtor's prepetition secured lender, which was also the Debtor's prepetition equity holder, provided a feeless postpetition financing facility, as well as exit financing.  |

<sup>1</sup> Order Pursuant to 11 U.S.C. §§ 105(a), 363, and 365 and Fed. R. Bankr. P. 2002, 6004, 6006 and 9014 Authorizing and Approving the Sale of Debtors' Assets Free and Clear of Interests (Docket No. 1602), entered April 14, 2011.

<sup>2</sup> Order Approving Agency Agreement, Store Closing Sales and Related Relief, entered on July 21, 2011.

<sup>3</sup> See Disclosure Statement for First Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code Proposed by the Debtors and the Official Committee of Unsecured Creditors (Docket No. 2110), dated November 10, 2011.

<sup>4</sup> Order Approving Asset Purchase Agreement and Authorizing the Sale of Assets of Debtors Outside the Ordinary Course of Business (Docket No. 729), entered on 11/21/2008.

<sup>5</sup> Second Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code of Joint Plan of BSCV, Inc. (F/K/A Boscov's, Inc.) and its Debtor Affiliates, dated July 22, 2009 (Docket No. 1242).

<sup>6</sup> Order Approving Agency Agreement, Store Closing Sales and Related Relief (Docket No. 1635), dated Jan. 16, 2009.

<sup>7</sup> Supplemental Disclosure with Respect to Second Amended Joint Plan of Liquidation of Circuit City Stores, Inc. and its Affiliated Debtors and Debtors in Possession and Its Official Committee of Creditors Holding General Unsecured Claims and Notice of Deadline to Object to Confirmation (Docket No. 8253), dated August 9, 2010.

Appendix to *The Disappearance of Retail Reorganization Under the Amended Section 365(d)(4)*  
 Written testimony of L. Gottlieb for the ABI Commission to Study the Reform of Chapter 11

| Case Name                                    | Disposition | Petition Date | Sale / Reorganization Date | Ch. 11 Reorganization Period | GUC Creditor Recovery   | Discussion   |
|--|-------------|---------------|----------------------------|------------------------------|-------------------------|--|
| Eddie Bauer (No. 09-12099) (Del.)            | 363 Sale    | 6/17/2009     | 7/23/2009 <sup>10</sup>    | 36 days                      | 2-17% <sup>11,12</sup>  | Eddie Bauer continued as a going concern, but with a substantially reduced retail footprint.   |
| Finlay Enterprises (No. 09-14873) (S.D.N.Y.) | Liquidation | 8/5/2009      | 9/25/2009 <sup>13</sup>    | 51 days                      | 4.85% <sup>14</sup>     | Winning bidder was Gordon Brothers with a liquidating bid. Secured claims were not paid in full, but \$7 million was carved out of their collateral for the benefit of general unsecured creditors in exchange for, <i>inter alia</i> , the release of certain claims.   |
| Goody's (No. 09-10124) (Del.)                | Liquidation | 1/13/2009     | 1/21/2009 <sup>15</sup>    | 8 days                       | 0.5% <sup>16</sup>      | Goody's Jan. 13, 2009 bankruptcy filing was its second in a single year. Its predecessor company filed for bankruptcy in June 2008 and emerged four months later after closing numerous stores and restructuring its debt. In advance of its second bankruptcy filing, Goody's entered into a joint venture agreement with Hilco and Gordon Brothers to run GOB sales. |
| Gottschalks, Inc. (No. 09-10157) (Del.)      | Liquidation | 1/14/2009     | 4/1/2009 <sup>17</sup>     | 77 days                      | 3.8-13.3% <sup>18</sup> | A potential going concern bidder decided at the last minute not to participate in the auction, and only liquidation bids were received.  |

<sup>8</sup> *Order Confirming First Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, As Modified on January 12, 2010* (Docket No. 301), entered January 14, 2010.

<sup>9</sup> *First Amended Disclosure Statement With Respect to the Debtor's First Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* (Docket No. 230), dated November 17, 2009.

<sup>10</sup> *Order (A) Approving the Sale fo the Debtors' Assets Free and Clear of all Liens, Claims, Encumbrances and Interests* (Docket No. 507), entered July 23, 2009.

<sup>11</sup> *Disclosure Statement for the First Amended Joint Plan of Liquidation of EBHI Holdings, Inc., et al.* (Docket No. 1270), dated Jan. 26, 2013.

<sup>12</sup> Holders of unsecured convertible notes received no distribution on account of their prepetition claim.

<sup>13</sup> *Order Approving Agency Agreement, Store Closing Sales and Related Relief* (Docket No. 262), entered Sept. 25, 2009.

<sup>14</sup> *Disclosure Statement for Debtors' Modified Plan of Liquidation Under Chapter 11 of the Bankruptcy Code* (Docket No. 661), dated May 18, 2010.

<sup>15</sup> *Order (I) Approving Assumption of Agency Agreement* (Docket No. 122), entered January 21, 2009.

<sup>16</sup> *First Amended Disclosure Statement for the Debtors' First Amended Plan of Liquidation Pursuant to Chapter 11 of the United States Bankruptcy Code Dated as of December 23, 2009* (Docket No. 997).

<sup>17</sup> *Order Approving Agency Agreement, Store Closing Sales and Related Relief* (Docket No. 349), entered April 1, 2013.

<sup>18</sup> *Disclosure Statement for Debtor's Chapter 11 Plan of Liquidation (January 14, 2010 Modification)* (Docket No. 1353).



Appendix to *The Disappearance of Retail Reorganization Under the Amended Section 365(d)(4)*  
 Written testimony of L. Gottlieb for the ABI Commission to Study the Reform of Chapter 11

| Case Name                           | Disposition    | Petition Date | Sale / Reorganization Date | Ch. 11 Reorganization Period | GUC Creditor Recovery | Discussion  |
|-------------------------------------|----------------|---------------|----------------------------|------------------------------|-----------------------|---|
| Harry & David (No. 11-10884) (Del.) | Reorganization | 3/28/2011     | 8/29/2011 <sup>19</sup>    | 154 days                     | 10% <sup>20,21</sup>  | Prepetition secured lender agreed to a debt for equity conversion, provided certain postpetition financing for the chapter 11 process, and made an equity contribution to the reorganized debtors upon their emergence from bankruptcy.   |
| Hub Holdings Corp. (No.             | 363 Sale       | 5/27/2009     | 7/30/2009 <sup>22</sup>    | 64 days                      | 2-4% <sup>23</sup>    | Debtors sold certain of their Levi's, Dockers, and Anchor Blue stores on a going concern basis, while simultaneously liquidating approximately 60 stores.   |
| Linens 'n Things (08-10832) (Del.)  | Liquidation    | 5/2/2008      | 10/16/2008 <sup>24</sup>   | 167 days                     | N/A                   | General unsecured creditors were given a stake in a trust which was vested with certain causes of action, but little or no recovery was anticipated for general unsecured creditors.<br><br>The postpetition financing facility required the Debtors to file a plan of reorganization by August 29, 2008, but the Plan was not acceptable to certain necessary parties, so the Debtors and their secured lenders agreed on a timeline for the liquidation of the remaining stores. The Debtors obtained approval to conduct going out of business sales and liquidate those stores on October 16, 2008. |
| Loehmann's (10-16077) (S.D.N.Y.)    | Reorganization | 11/15/2010    | 2/9/2011 <sup>25</sup>     | 86 days                      | 7.6% <sup>26</sup>    | Debt for equity swap accomplished with the support of certain of the Debtors' prepetition secured lenders (with a restructuring support agreement negotiated prepetition).  |

<sup>19</sup> Order Confirming the Second Amended Joint Plan of Reorganization of Harry & David Holdings, Inc. and its Debtor Subsidiaries, as Modified and Restated (Docket No. 767), entered on August 29, 2011.

<sup>20</sup> Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code for the Second Amended Joint Plan of Reorganization of Harry & David Holdings, Inc. and its Debtor Subsidiaries (Docket No. 504), dated June 24, 2011.

<sup>21</sup> Certain unsecured noteholders and the Pension Benefit Guaranty Corporation were given an alternative recovery, which was estimated to be worth between 2 and 17.4% of their claim. *Id.*

<sup>22</sup> The Levi's and Dockers divisions were sold on June 30, 2009, while the Anchor Blue division was sold on July 30, 2009. See Docket Nos. 273, 497, and 182.

<sup>23</sup> Disclosure Statement for First Amended Joint Plan of Liquidation Under Chapter 11 of the Bankruptcy Code (Docket No. 1353), dated January 6, 2011.

<sup>24</sup> Order Approving Agency Agreement, Store Closing Sales and Related Relief (Docket No. 1861), entered October 16, 2008.

Appendix to *The Disappearance of Retail Reorganization Under the Amended Section 365(d)(4)*  
 Written testimony of L. Gottlieb for the ABI Commission to Study the Reform of Chapter 11

| Case Name                             | Disposition | Petition Date | Sale / Reorganization Date | Ch. 11 Reorganization Period | GUC Creditor Recovery | Discussion  |
|---------------------------------------|-------------|---------------|----------------------------|------------------------------|-----------------------|---|
| Movie Gallery (10-30696) (E.D. Va.)   | Liquidation | 2/2/2010      | 5/20/2010                  | 107 days                     | N/A <sup>27</sup>     | <p>Movie Gallery emerged from its first bankruptcy proceeding in 2008. At the commencement of the second bankruptcy in February 2010, certain stores were immediately liquidated. In April of 2010, the Debtors and their creditors concluded that it was in the best interest of creditors and other parties in interest to liquidate the Debtors' remaining assets and wind-down the Debtors' affairs. On May 20, 2010, the Court entered an Order approving the liquidation of most of the Debtors' remaining assets with Great American acting as liquidator.</p> <p>General unsecured creditors obtained interests in a liquidating trust on account of their prepetition claims. The trust was funded with \$5 million.</p> |
| Ritz Camera Centers (09-10617) (Del.) | 363 Sale    | 2/22/2009     | 7/23/2009 <sup>28</sup>    | 151 days                     | 4-14% <sup>29</sup>   | In 2012, the purchaser of Ritz's assets filed for bankruptcy and the company was liquidated.  |
| Sharper Image (08-10322) (Del.)       | Liquidation | 2/19/2008     | 5/30/2008 <sup>30</sup>    | 101 days                     | >1% <sup>31</sup>     | Sharper Image obtained Court authority to conduct GOB sales at 96 of its 184 stores on March 12, 2008, less than a month after the case commenced. After being unable to reorganize or find a bidder for its assets as a going concern, Sharper Image sold its remaining assets on May 30, 2008.  |

<sup>25</sup> *Findings of Fact, Conclusions of Law and Order Confirming Debtors' Second Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* (Docket No. 398), entered on February 9, 2011.

<sup>26</sup> *Disclosure Statement for Debtors' Second Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* (Docket No 246), dated January 3, 2011.

<sup>27</sup> *Disclosure Statement with Respect to Joint Plan of Liquidation of Movie Gallery Inc. and its Affiliated Debtors and Debtors in Possession* (Docket No. 1752), dated September 8, 2010.

<sup>28</sup> *Order Approving Sale of Substantially All of the Debtor's Assets and Granting Related Relief* (Docket No. 837), dated July 23, 2009.

<sup>29</sup> *First Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code with Respect to the First Amended Joint Plan of Liquidation Under Chapter 11 of the United States Bankruptcy Code Proposed by the Debtor and the Official Committee of Unsecured Creditors, dated March 2, 2010* (Docket No. 1373), dated March 2, 2010.

<sup>30</sup> *Order Approving Asset Purchase Agreement, Agency Agreement, Store Closing Sales, And Related Relief* (D.I. No. 763, entered on May 30, 2008.

Appendix to *The Disappearance of Retail Reorganization Under the Amended Section 365(d)(4)*  
 Written testimony of L. Gottlieb for the ABI Commission to Study the Reform of Chapter 11

| Case Name                                  | Disposition               | Petition Date | Sale / Reorganization Date | Ch. 11 Reorganization Period   | GUC Creditor Recovery    | Discussion  |
|--|---------------------------|---------------|----------------------------|--|--------------------------|---|
| Steve & Barry's (08-12579) (S.D.N.Y.)      | 363 Sale                  | 07/9/2008     | 08/22/2008 <sup>32</sup>   | 44 days  | 1.75-2.52% <sup>33</sup> | <p>The Debtor sold substantially all of its assets to BH S&amp;B Holdings, LLC in less than 60 days of the commencement of the bankruptcy case.</p> <p>Less than three months after purchasing the debtor's assets, BH S&amp;B filed for bankruptcy, and the remaining Steve &amp; Barry stores were liquidated.</p>  |
| Syms / Filene's Basement (11-13511) (Del.) | Liquidation <sup>34</sup> | 11/2/2011     | 8/30/2012 <sup>35</sup>    | 302 days (but all assets except owned real estate were liquidated within the first 2 months of the case) | 75-100% <sup>36</sup>    | <p>General unsecured creditors of Syms and certain general unsecured creditors of Filene's received a distribution of 100% of their prepetition claims.</p> <p>Other general unsecured creditors of Filene's Basement received 75% of their allowed general unsecured claims.</p> <p>The distinction between the groups has to do with solvency of Syms, which held substantial real estate assets.</p> |

<sup>31</sup> *Joint Motion of the Debtor and the Official Committee of Unsecured Creditors, Pursuant to Sections 105(a), 305(a), and 1112(b) of the Bankruptcy Code, for Entry of an Order (I) Approving Procedures for (A) the Dismissal of the Debtor's Chapter 11 Case, (B) the Distribution of Certain Funds to Holders of Allowed Unsecured Claims, and (C) the Disallowance of Certain Gift Card Claims and (II) Granting Certain Related Relief* (Docket No. 2465), approved on August 13, 2012 (Docket No. 2475).

<sup>32</sup> *Order Pursuant to Sections 105(A), 363 and 365 of the Bankruptcy Code and Bankruptcy Rules 6004, 6006 and 9014 Authorizing the Sale of Substantially All of the Debtors' Assets, Free and Clear of Liens, Claims, Encumbrances and Other Interests* (Docket No. 628), dated August 22, 2008.

<sup>33</sup> *Disclosure Statement for Joint Plan of Liquidation Under Chapter 11 of the United States Bankruptcy Code Proposed by the Debtors and the Official Committee of Unsecured Creditors* (Docket No. 1912), dated March 4, 2008.

<sup>34</sup> Technically, Syms/Filene's Bankruptcy did emerge from bankruptcy, but it did so as a real estate company, with no retail operations.

<sup>35</sup> *Findings of Fact, Conclusions of Law and Order Confirming the Modified Second Amended Joint Chapter 11 Plan of Reorganization of Syms Corp. and its Subsidiaries* (Docket No. 1983), entered on August 30, 2012.

<sup>36</sup> *Disclosure Statement with Respect to the Second Amended Joint Chapter 11 Plan of Reorganization of Syms Corp. and Its Subsidiaries* (Docket No. 1641), dated July 13, 2012.

Appendix to *The Disappearance of Retail Reorganization Under the Amended Section 365(d)(4)*  
 Written testimony of L. Gottlieb for the ABI Commission to Study the Reform of Chapter 11

| Case Name   | Disposition | Petition Date | Sale / Reorganization Date | Ch. 11 Reorganization Period | GUC Creditor Recovery    | Discussion  |
|---|-------------|---------------|----------------------------|------------------------------|--------------------------|---|
| The Bombay Co. (No. 07-44084) (N.D. Tex.)                     | Liquidation | 9/20/2007     | 10/16/2007 <sup>37</sup>   | 26 days                      | 16.4-28.9% <sup>38</sup> | After an auction (held within the first three weeks of the case) produced no going concern bids, Bombay liquidated its U.S. stores under a joint venture agreement with Gordon Bros. and Hilco. |
| United Retail Group d/b/a Avenue Stores (12-10405) (S.D.N.Y.) | 363 Sale    | 2/1/2012      | 4/3/2012 <sup>39</sup>     | 62 days                      | 9.2-11% <sup>40</sup>    | Purchaser of the Debtors' assets was chosen as stalking horse bidder prepetition and received \$20 million "parent contribution" from the Debtors' prepetition owner to facilitate the sale.    |

<sup>37</sup> Order Pursuant to Sections 363, 365 and 554 of the Bankruptcy Code (A) Authorizing and Approving the Conduct of Store Closing or Similar Themed Sales, with Such Sales to be Free and Clear of All Liens and Encumbrances, (B) Approving an Agency Agreement for the Conduct of the Subject Store Closing Sales (Docket No. 400), entered on October 16, 2013.

<sup>38</sup> Disclosure Statement for First Amended Consolidated Joint Plan of Liquidation of the Debtors Together with the Official Committee of Unsecured Creditors Under Chapter 11 of the Bankruptcy Code (Docket No. 1369), dated July 2, 2008.

<sup>39</sup> Order Authorizing the Sale of Substantially All of the Debtors' Assets Free and Clear of All Claims, Liens, Rights, Interests and Encumbrances (Docket No. 496), entered on April 4, 2012.

<sup>40</sup> Debtors' Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code (Docket No. 619), dated June 14, 2012.