



AMERICAN
BANKRUPTCY
INSTITUTE

Central States Bankruptcy Workshop

Business Track

Retail Cases from Coast to Coast: What Can Unsecured Creditors Expect to See?

Hon. Lisa S. Gretchko, Moderator

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Retail and Restaurant Franchise Cases

ABI CENTRAL STATES CONFERENCE
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Judge Lisa Gretchko – US Bankruptcy Judge – Detroit

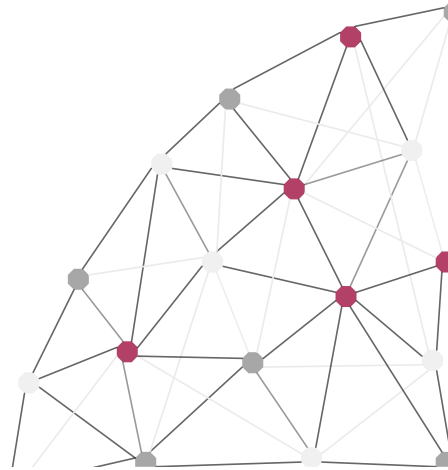
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1. Landscape Issues

1. 2 years of significant product and labor cost inflation.
2. Retail pricing finally catching up with cost inflation to restore profit margins.
3. Demographic shifts and buying behavior changes affect AUV and sales mix.
4. Franchisees need to close 10% to 25% of portfolio that are money losing stores, but franchisors resisting the associated loss of their recurring revenue stream.
5. \$15/hour minimum wage happened due to market forces and not legislation.



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I. Landscape Issues (Cont'd)

1. Labor availability is still tight, but improving and stable.
2. Minimal store remodels have been done over the last 5 years, so most Franchisees need significant remodel CapEx to return to a 7-to-10-year remodel schedule.
3. Remodel CapEx requirements significantly impair Value of Franchisee operations.
4. Must be careful not to sell money losing stores along with money making stores or you essentially pay Buyer to take money losers.
5. Owner's personal guarantees on Franchise Agreements and store leases can affect management decision making.



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II. Pre-filing Issues

1. Closure of money losing stores should be done pre-petition and not post petition.
2. De-brand closed stores and remove and store closed store equipment – of value as spare equipment to go forward operations.
3. Assess deferred CapEx remodeling estimated costs.
4. Engage real estate advisor before filing to renegotiate lease rates to improve value.
5. Model weekly cash flow and conserve pre-filing cash.



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II. Pre-filing Issues (Cont'd)

1. Assess applicability of WARN Act if laying off/terminating employees.
2. Develop KEIP to incentivize and retain key employees.
3. Develop communications plan for employers, trade creditors and landlords.
4. Assess administrative claims – 503(b)(9), PACA, and PASA.
5. Engage investment banker before filing and start marketing process if a Going Concern Sale is planned.

III. First Day Issues – DIP Financing and Cash Collateral

1. Develop Consensual DIP Budget or cash collateral budget (maybe non-consensual).
2. Know who has liens and on what (cash, inventory, credit card AR, equipment, leasehold improvements, security deposits, etc.).
 - Secured Creditor
 - Landlords
 - Product Vendor (PMSI)
3. Interplay between budget and 506(c) waivers
4. Liens on leasehold interests
5. Miscellaneous – Access rights, insurance recovery, liens on security deposits

III. First Day Issues – Critical Vendor

1. Standard for approval of critical vendor treatment
2. Executory contract gap period obligations of vendors
3. Vendor automatic stay missteps when seeking critical vendor status
4. Typical terms for of critical vendor agreements, including payment clawback upon default, waiver of lien rights and reclamation rights, waiver of unpaid prepetition claim



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2023 Spring Educational Conference

IV. Post Filing Right Sizing Issues – Store Closing

1. Going out of business sales (GOB)
 - Assess likelihood of administrative insolvency when trade creditors extend post-petition credit
 - Liquidator selection – contract terms are critical
- Process for sales (Party City, TM II)
- Side letters with liquidator
- Providing sufficient funding for sale – who is responsible for the shortfall?
- Dispute resolution mechanism – emergency hearing if not conducted according to procedures



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IV. Post Filing Right Sizing Issues – Lease Restructuring

1. Context - Threat of rejection to negotiate improved terms to lower operational costs on exit or to make leases more attractive to buyer
2. What tenant wants to avoid rejection?
 - Lower base rent
 - Cure / “stub rent” waivers
 - Renewal options
3. What landlord wants in exchange for concessions?
 - Escalation provisions
 - Shorter renewal terms
 - Termination rights
 - Credit enhancements (guaranties / security deposits)
 - Defensive provisions (reinstatement of original terms upon rejection, allowance of post-petition rent)

IV. Post Filing Right Sizing Issues – Enforcement of Monetary / Non-Monetary Obligations

1. Timing of “stub rent” payment – case context and economics of litigating
 - Liquidation or GOB Sale
 - Sale or Plan Effective Date
2. Payment of post-petition rent - section 365(d)(3) vs. rent deferral / abatement
3. Allowance of administrative priority claims vs. critical vendor rights
4. Compliance with terms under franchise agreements to preserve value of trademarks

V. 363 Sale Issues – Franchise Issues

1. Franchisor and Landlord cures must be paid out of sales proceeds to assume and assign and assign contracts.
2. Franchise Agreements
 - Because a Brand Rights (IP) are included, these agreements can't be assumed and assigned without Franchisor's consent.
 - Some Circuits allow only assumption without Franchisor's consent. Could be important for Plan of Reorganization.
3. Franchisor essentially has a veto power over any buyer.
 - Franchisor can offer incentives to Buyers, and it can differ from Buyer to Buyer.



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V. 363 Sale Issues – Landlord Issues

1. Often the “net” value of a Sale to the estate increases as number of locations purchased decreases due to decreased cure costs.
2. Landlords need to be mindful that cures include “accrued, unbilled” property taxes and CAM.
3. Landlords have right to receive reasonable, adequate assurance from Buyers.
 - Shopping center provisions under Section 365(b)(3)
 - Pre-auction notice and disclosure of adequate assurance information
4. Landlords may be able to “credit bid” for a lease assumption.



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V. 363 Sale Issues – Picking the Winner and Approving the Sale

1. Competing APAs - If you are confident that you will have multiple bidders at an auction, then a simple Stalking Horse APA with a slightly lower price is better than a complicated APA with a slightly higher price. That's because the Stalking Horse sets a form APA which other bidders will use to bid.
2. "Pay the Freight" - Financial wherewithal to fund administrative costs and pay dividend to general unsecured creditors
3. Operational expertise to be able to perform under franchise agreement and leases on a post-closing basis
4. NewCo Issues - sufficient capitalization of the NewCo buyer post-closing to fund opex)

Faculty

Mark A. Bogdanowicz is a partner with the law firm of Spencer Fane, LLP in Nashville, Tenn., where he concentrates his practice in the areas of business transactions and corporate and commercial litigation, with an emphasis on bankruptcy and creditors' rights. He has represented both secured and unsecured creditors (including landlords, franchisors, trade creditors and utilities) in all aspects of chapter 11 cases. Mr. Bogdanowicz has more than 17 years of experience representing landlords in national retail cases. He serves on the advisory board of ABI's Central States Bankruptcy Workshop, and he is a coordinating editor for the *ABI Journal*, as well as a regular contributor. Mr. Bogdanowicz is admitted to practice before the state courts of Illinois, Indiana and Tennessee, as well as the Seventh Circuit Court of Appeals, the Federal District Courts for the Northern, Central and Southern Districts of Illinois, the Eastern District of Michigan, the Northern and Southern Districts of Indiana and the Middle District of Tennessee. He received his A.B. *cum laude* from Harvard University in 1995 and his J.D. from Vanderbilt University School of Law in 2000, where he was the articles editor of the *Vanderbilt Law Review*.

Daniel F. Dooley, CTP is a principal and CEO at MorrisAnderson in Chicago, where he manages the firm's distressed business consulting practice. He has a national reputation in turnaround management, operations improvement, debt restructuring and assuming C-level positions for clients. Mr. Dooley is a frequent speaker at industry conferences and a regular published author for industry periodicals. He has served multi-year terms on the board of directors of both the Turnaround Management Association (TMA), for which he served as president of its Chicago chapter, and ABI. Mr. Dooley has planned and implemented significant financial improvements for clients in many industries, including aerospace, agriculture, automotive, capital equipment, distribution, food, health care, metals, oil and gas, restaurants and transportation. Prior to joining MorrisAnderson in 1997, he served as an executive with several Fortune 500 manufacturers, including Illinois Tool Works (ITW), an industrial manufacturer, and Allied Signal, an automotive electronics and aerospace manufacturer. He has served on board of directors and been a key advisor to small and large corporations and non-profit organizations. Mr. Dooley has successfully managed numerous projects for middle-market companies and assumed dozens of interim-management positions as an independent director, CEO, CRO and CFO for client companies nationwide. During his career, he has negotiated numerous transactions involving debt-restructuring, supplier accommodations and business sales. Mr. Dooley specializes in the development and implementation of cost-reduction and restructuring plans, as well as restructuring negotiations between companies and their creditors. He educates company ownership and management on realistic business plans, implementation of cost and liquidity improvements, and effective end-game strategies for clients. He also collaborates with management on issues related to turnaround, restructuring plans and business sales. Mr. Dooley has achieved results for companies in the automotive, aerospace, agriculture, capital equipment, metals, health care, transportation, food, distribution, oil and gas, and real estate industries. He is also a contributing author to *The Chief Restructuring Officer's Guide to Bankruptcy: Views from Leading Insolvency Professionals* (ABI 2013). Mr. Dooley received his B.B.A. and M.B.A. in finance from the University of Minnesota Carlson School of Management.

Hon. Lisa S. Gretchko is a U.S. Bankruptcy Judge for the Eastern District of Michigan in Detroit, sworn in on April 5, 2021. Prior to her judicial appointment, she spent more than four decades as a bankruptcy/creditors' rights attorney and represented nearly every constituency in bankruptcy courts around the country, including secured creditors, unsecured creditors' committees, landlords, licensors of intellectual property, customers, suppliers, business debtors and trustees. Judge Gretchko has written and lectured extensively for various organizations on numerous bankruptcy and creditors' rights issues. From April 2018-April 2022, she served as ABI's Vice President-Publications, as a member of ABI's Executive Committee and Board of Directors, and as ABI's Publications Committee chair. Judge Gretchko is a former Executive Editor of the *ABI Journal* and a former co-chair of the ABI's Unsecured Trade Creditors Committee, which named her 2014 Committee Person of the Year. She also has been named in *Michigan Super Lawyers* and *The Best Lawyers in America*, and she was honored as a Woman in the Law by *Michigan Lawyer's Weekly* in 2011. Judge Gretchko received her B.A. with honors in 1976 from the University of Michigan, where she was elected Phi Beta Kappa, and her J.D. with honors in 1978 from the University of Detroit.

Laurel D. Roglen is Of Counsel with Ballard Spahr LLP in Wilmington, Del., where she focuses her practice on corporate bankruptcy and restructuring, commercial bankruptcy, and workout and restructuring matters. She represents corporations as debtors and debtors-in-possession in chapter 11 bankruptcy proceedings, as well as commercial retail landlords, trade vendors, committees and purchasers of assets through § 363 sales in bankruptcy matters, regularly counseling clients on their rights in bankruptcy cases, in addition to negotiating lease amendments, agreements and settlements. Ms. Roglen also is experienced in bankruptcy-related litigation and issues at the intersection of environmental and bankruptcy law. She currently represents the City of Chester, Pa., in its ongoing chapter 9 bankruptcy case and is admitted to practice in Delaware and New York. Ms. Roglen received her B.A. in 2008 from Pennsylvania State University and her J.D. *cum laude* in 2011 from Hofstra University School of Law, where she received ABI's Medal of Excellence, the American College of Bankruptcy Distinguished Law Student award and the Benjamin Weintraub and Alan Resnick Bankruptcy Law Award, and was managing editor of articles for the *Hofstra Law Review*.

Scott A. Wolfson is practice lead of Corporate Bankruptcy & Restructuring and ADR/Facilitation at Wolfson Bolton Kochis in Troy, Mich., where he focuses on bankruptcy and insolvency, commercial litigation, business disputes and counseling, automotive supply chain issues, and ADR/facilitation. His clients have included distressed companies, corporate debtors in bankruptcy, unsecured creditors' committees, preference and fraudulent transfer defendants, hospitals, tier-one and sub-tier suppliers, technology companies, start-ups, directors and officers, trade creditors, trustees, receivers, lenders, landlords, tenants, asset-purchasers and lessors. Mr. Wolfson has experience representing original equipment manufacturers and suppliers, including ensuring the continuity of supply from nonperforming, financially distressed or bankrupt suppliers. His expertise is in representing customers in the enforcement of their contract rights with suppliers in both state and federal courts. Mr. Wolfson also has experience litigating lien disputes under Michigan's Special Tools Lien Act and Molder's Lien Act. He advises secured creditors in all aspects of loan workouts and restructurings, including creditors' rights representation, and represents financially distressed companies restructuring in and out of court. He also represents purchasers of assets in bankruptcy and similar state court proceedings, including litigation of sale procedures and disputes. Mr. Wolfson is a certified mediator and has mediated preference, fraudulent conveyance and commercial disputes, members of boards of directors, and corporate officers in breach-of-fiduciary-duty and derivative litigation. He also has criminal

jury trial experience as defense counsel and as a former prosecutor for the Keweenaw Bay Indian Community. Mr. Wolfson has been named one of the top 100 lawyers in Michigan in the 2010-16 *Super Lawyers* survey, and as one of the top 50 Michigan business lawyers from 2013-16, in *Michigan Super Lawyers* from 2009-17, in *Michigan Rising Stars* for 2008, in *The Best Lawyers in America* from 2010-18 (for which he was named Lawyer of the Year) and as one of the *dbusiness* Top Lawyers from 2010-18. He is a Fellow of the Oakland County Bar Foundation and is rated AV-Preeminent by Martindale-Hubbell. Mr. Wolfson received his B.A. from Michigan State University's James Madison College in 1992 and his J.D. *cum laude* from the University of Minnesota Law School in 1995, where he was a managing editor of the *Law and Inequity Journal*.