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Holiday Season Won't Save Many Retailers In Pandemic Year

By **Vince Sullivan**

Law360 (October 23, 2020, 7:00 PM EDT) -- Thanks to the COVID-19 pandemic, the holiday shopping season can no longer be counted on to stave off bankruptcy oblivion for dozens of retailers, with major merchants who haven't developed a strong online presence likely to pay the ultimate price, experts told Law360.

Bankruptcy and retail experts agree that the so-called Amazon effect was already presenting a serious challenge for retailers when the pandemic caused revenue at their physical locations to be slashed to zero for several months. Without a robust online presence, many may not survive even if the holiday season comes with an unexpectedly large jump in sales.

"We went from an extraordinarily weak retail environment pre-pandemic, and then, of course, into the pandemic. Depending upon where you live, we're now on month seven," Michael Sirota, a partner in the bankruptcy practice of Cole Schotz PC, told Law360. "That was the ultimate knockout punch to retailers."

The future of retail has been trending toward e-commerce slowly but surely over the last few years, but Morgan Lewis & Bockius LLP partner Anne Marie Estevez said the pandemic was a bomb dropped on the industry that has wiped out retailers with heavy debt burdens, challenged liquidity and a lack of online presence. The upheaval has forced many of the largest players— including J.C. Penney Co., Neiman Marcus Group and Ann Taylor — into bankruptcy, and others have been pressed to adapt much faster than at any time in recent history.

"Even when we emerge from this pandemic, retailers are going to continue to adapt, and the primary reason for that is that all of the retail trends we've been watching have been accelerated by five years," Estevez said. "We knew it was going to grow fast, but the acceleration in e-commerce has been unfathomable to me."

These accelerations include the use of third-party delivery services like Instacart, the adoption of curbside pickup models and the boosting of e-commerce platforms on retailer and restaurant websites, she said.

Even with these new services, the holiday shopping rush won't be the salvation that it has been for struggling retailers in the past. Images of hundreds of people queueing outside of a big box store to surge in and snap up huge deals in the early morning hours the day after Thanksgiving may become only a memory as retailers adjust to social distancing guidelines and capacity, and consumers aren't eager to venture out in the midst of the pandemic.

"I don't think the holiday season alone is going to keep businesses afloat, and I don't think the shopping experience is going back to the way it was any time soon and maybe never," said Brian M. Resnick, a restructuring partner at Davis Polk & Wardwell LLP. "Retailers are going to have to focus on the changes that are needed to adapt to the new environment."

This means creating a safe experience for shoppers so they can feel confident in going into a brick-and-mortar store, as well as offering the products people want in the new normal, mostly essential items, Resnick said.

Estevez said the post-Thanksgiving shopping kickoff will still exist but will be scaled back as stores adjust to the necessary safety protocols.

"I do think that there will still be Black Friday, and people will still be lined up for deals, but I also think a lot of retailers are taking on the responsibility to ensure that it's safe," she said. "It's going to take a lot of planning, and some will do a great job."

When outlets inevitably sink into bankruptcy, they will need the support of their lenders and their landlords to implement sweeping operational changes to have a chance at coming out the other side of a Chapter 11 intact. More than just a straightforward asset sale or debt-for-equity swap, retailers—especially those with large physical footprints— need to negotiate with a variety of stakeholders to implement a successful restructuring. This includes rent deferrals or abatements, balance sheet restructuring, employee considerations and go-forward business plans.

"A business plan can't just be let's fix the balance sheet and do more of the same and hope COVID goes away," Resnick said. "It needs to be a well thought out business plan that addresses the challenges that are likely going to be here for several years to come."

Talks with lenders and other parties should start as soon as a bankruptcy filing becomes an option, he said.

John J. Sparacino, a principal in the bankruptcy practice of McKool Smith PC, said these talks should focus on right-sizing the business by identifying which locations will continue to be profitable and taking steps to close others while addressing rent with landlords to conserve cash.

"You need to determine who the vendors are you absolutely need to go forward with and continue good relations with, and also identify those who aren't core or necessary or may not fit into your business plan in the future," he said.

Investors flush with cash are waiting in the wings to snap up assets from distressed corporations, including retailers, so sales of e-commerce platforms, intellectual property and physical store assets will likely continue, but liquidations have also been happening in Chapter 11 cases this year. Sirota said that he's had successful cases and that moving through bankruptcy with rapidity is the key to restructuring in the current environment.

"We have been very fortunate and have had, in this environment, very successful cases," he said. "We define that as keeping the retailer in business in some form, and obviously preserving jobs."

The specter of a new wave of COVID-19 cases that leads to another shutdown of non-essential businesses haunts retailers, and the experts agree that, in the absence of significant government relief, thousand more jobs in the industry will be lost if that comes to pass.

"If there is going to be a massive shutdown there is going to have to be massive government relief in order to keep businesses afloat until we get to the other side," Resnick said.

Companies that retreated into bankruptcy court before the outbreak of the coronavirus this year were forced to abandon restructuring plans when buyers backed out of asset acquisitions or store-closing sales were scrapped due to business closures. The Modell's sporting goods chain, for instance, wrapped up its liquidation months earlier than planned after it sought bankruptcy protection and the economy was shuttered.

Pier 1 Imports Inc. was headed toward an asset sale that would have kept a core of stores operating but pivoted to a full chain liquidation in May after two months of stunted business.

"That's what's got people nervous. If you're just starting to try to dig out and maybe you have a solution, you don't want to be in the middle of a purchase and sale and then the economy gets closed down and the buyer says no thank you," Sirota said.

He has seen asset purchase agreements in recent months with specific COVID-19 clauses requiring a buyer to close the sale even if there is another pandemic-related shutdown.

Every retailer is hoping to have a wildly successful holiday shopping season to avoid that fate, and for some the online sales will replace the lost revenue from their physical locations, but others tying their futures to the next three months of revenue will likely be fatally disappointed.

"This holiday season will be the most interesting of my lifetime," Estevez said.

--Editing by Brian Baresch.
