

# **GOING OUT OF BUSINESS SALES IN BANKRUPTCY**

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**James H.M. Sprayregen  
Jonathan P. Friedland  
Marjon Ghasemi<sup>†</sup>  
Kirkland & Ellis LLP  
200 E. Randolph Drive  
Chicago, Illinois 60601  
312-861-2000**

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<sup>†</sup> Messrs. Sprayregen and Friedland are partners, and Ms. Ghasemi is an associate, with Kirkland & Ellis LLP. The authors wish to acknowledge the thoughtful comments of Mark Naughton, Vice President and General Counsel of Great American Group.

## I. Introduction

- A. There have been many large retailer bankruptcies in the past few years.<sup>1</sup> A primary asset of retail debtors is their inventory.<sup>2</sup> At the same time, large retailers tend to have at least some unprofitable locations and moving inventory from one location to another can be very expensive. Accordingly, retail debtors often choose to liquidate inventory located at their unprofitable locations through Bankruptcy Court approved going out of business sales (“GOB Sales”).
- B. GOB Sales generally are conducted through an Agent (as defined in Section II of this outline) that is picked through a competitive bidding process.
- C. GOB Sales also are conducted outside of bankruptcy, and are highly regulated by state and local authorities. State statutes and local regulations often limit a merchant’s ability to conduct such sales (at least outside of a bankruptcy proceeding), in an effort to both protect consumers from deceptive practices and to protect other businesses from unfair competition. Commercial leases also generally include provisions limiting a tenant’s ability to conduct such sales.
- D. Faced with the interests of consumers, other businesses and landlords, bankruptcy courts tend to lean in favor of the debtor’s duty to maximize value for the benefit of the estate. Accordingly, courts have almost unanimously interpreted the

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<sup>1</sup> For example, In re Factory 2 U Stores, Inc., United States Bankruptcy Court for the District of Delaware, Case No. 04-10111; In re Footstar, United States Bankruptcy Court for the Southern District of New York, Case No. 04-22350; In re Gadzooks, Inc., United States Bankruptcy Court for the Northern District of Texas, Case No. 04-31486-11; In re KB Toys, Inc., United States Bankruptcy Court for the District of Delaware, Case No. 04-10120; In re New World Pasta Company, United States Bankruptcy Court for the District of Pennsylvania, Case No. 04-02817; In re One Price Clothing, Inc., United States Bankruptcy Court for the District of Delaware, Case No. 04-40329; In re Bag ‘n Baggage, United States Bankruptcy Court for the Northern District of Texas, Case No. 03-35721; In re Clothetime Stores, United States Bankruptcy Court for the Central District of California, Case No. 03-14555; In re FAO, Inc., United States Bankruptcy Court for the District of Delaware, Case No. 03-10119; In re Spiegel, Inc., United States Bankruptcy Court for the Southern District of New York, Case No. 03-13674; In re Warehouse Entertainment, Inc., United States Bankruptcy Court for the District of Delaware, Case No. 03-10224; In re Kmart Corporation, United States Bankruptcy Court for the Northern District of Illinois, Case No. 02-302474; In re Mattress Discounters Corp., United States Bankruptcy Court for the District of Maryland, Case No. 02-22330; In re Museum Company, Inc., United States Bankruptcy Court for the District of Delaware, Case No. 03-11525.

<sup>2</sup> Real estate assets (whether fee or leased interests) are, of course, a key asset of any retail debtor. This article is limited to going out of business sales of inventory. As a related matter, debtors will need somehow to dispose of their real property leases in connection with the sale locations. One option available to debtors is selling their rights to assign such leases (commonly referred to as “designation rights”). Selling its designation rights allows a debtor to realize the value of its leases without having to incur the costs associated with having to market the leases. Motions seeking approval of the sale of designation rights are often opposed by landlords arguing that there is no Bankruptcy Code authority for granting such relief. Courts, however, tend to permit the sale of designation rights. See generally In re Montgomery Ward, LLC, 307 B.R. 782 (D.Del. 2004); In re Kmart Corp., WL 1956149 (N.D. Ill. 2003); Weingarten Nostat, Inc. v. Service Merchandise Co., Inc., 2005 WL 129731 (6<sup>th</sup> Cir. 2005).

Bankruptcy Code to give debtors relief from certain restrictions on GOB Sales contained in real property leases and federal, state and local regulations.

E. Organization of this outline:

- Section II of this outline defines certain key terms.
- Section III provides an overview of relevant nonbankruptcy law.
- Section IV discusses the critical role of the Agent (as defined below) in the GOB Sale process.
- Section V identifies the components of the Agency Agreement (as defined below).
- Section VI discusses the efficient nature of the GOB Sale process.
- Section VII discusses the law of GOB Sales in a bankruptcy context.

## II. Terminology

- A. **Merchant:** The retailer/debtor who engages an Agent to conduct the GOB Sale.
- B. **Agency Agreement:** The agreement between the Merchant and Agent.
- C. **Agent:** The third party who enters into the Agency Agreement and conducts the GOB Sale.

## III. Relevant Nonbankruptcy Laws

- A. “Going out of business” sales tend to draw much more of a crowd than similar “clearance” or “store closing” sales. Because of the allure that GOB Sales have to consumers, many states specifically regulate such sales both to prevent consumers from being misled and to protect other businesses from unfair competition.<sup>3</sup>
- B. States generally look to local authorities to regulate GOB Sales. Typically, state and local authorities require a license and fee to hold a GOB Sale. The licensing procedure usually includes an application that seeks information including:
1. the applicant’s name and address;
  2. certain corporate formation information, if applicable;

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<sup>3</sup> See, e.g., Ala.Code 1975 § 8-13-1, *et seq.*; A.C.A. § 4-74-101, *et seq.*; West’s Ann.Cal.Com.Code § 6102, *et seq.*; DC ST § 28:6-102, *et seq.*; West’s F.S.A. § 559.20, *et seq.*; 815 ILCS 350, *et seq.*; Ind.Code Ann. 25-18-1, *et seq.*

3. a description of the goods to be sold and information regarding whether the applicant is the true owner of the goods;
4. the name and address of a person in charge of the GOB Sale;
5. the beginning and end date of the GOB Sale;
6. the level of inventory existing at the beginning of the GOB Sale;
7. information regarding any leases related to the GOB Sale locations;
8. the reason for the expeditious sale of the goods;
9. the descriptive name of the GOB Sale;
10. information regarding what is to become of the business after the GOB Sale;
11. certain statements regarding the goods subject to the GOB Sale.

C. In particular, certain state and local laws have licensing or permitting requirements or regulations that may be problematic or burdensome for the Agent, such as restrictions that impose:

1. limitations on the length of the GOB Sale;<sup>4</sup>
2. limitations on repeated GOB Sales in a certain period of time;<sup>5</sup>
3. limitations on the Agent's ability to augment the inventory with additional goods;<sup>6</sup> and
4. limitations on advertising.<sup>7</sup>

#### **IV. The Agent**

A. An Agent is usually chosen through a competitive bidding process. Potential Agents submit offers that are assessed by the Merchant. In bankruptcy, there is typically a stalking horse Agent and a court-approved bidding process. The stalking horse Agent often seeks the right to receive a break-up fee if it is outbid

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<sup>4</sup> See, e.g., Miss. Code Ann. § 21-19-37.

<sup>5</sup> See, e.g., Ind.Code Ann. 25-18-1-16.

<sup>6</sup> See, e.g., Ala.Code 1975 § 8-13-3.

<sup>7</sup> See, e.g., A.C.A. § 4-74-105.

by another Agent. In such a case, the debtor/Merchant requests Bankruptcy Court approval of the break-up fee as well as the guidelines for the competitive bidding process.

- B. After bidding procedures are established by a Bankruptcy Court order, all parties in interest, including affected landlords, are served with notice packages that include the contract between the debtor and the stalking horse Agent, notice of the opportunity to make higher or better bids, information regarding minimum overbids, and guidelines for the proposed GOB Sales.<sup>8</sup> Generally, bidding will occur in open court or at the offices of the debtor's counsel. Outside of bankruptcy, of course, the hiring of the Agent does not require any court approval.

## V. The "Agency Agreement" Dissected.

- A. **Generally.** The Agency Agreement is the document that governs the rights and obligations between the Agent and the Merchant. Specifically, and as discussed below, the Agency Agreement identifies the consideration the Merchant will receive, the methodology for a physical inventory of the goods, the extent of the inventory that will be the subject of the GOB Sale, and any conditions precedent that the Agency Agreement is based upon.

### B. **Hybrid transaction**

- The Agency Agreement sets the terms of a hybrid transaction that is not quite a sale, but has many attributes of a sale. The Agent typically agrees to pay a guaranteed amount to the Merchant, and often agrees to share in proceeds of the GOB Sale above a certain amount.

### C. **Inventory Taking**

- The Agency Agreement will identify the agreed-upon methodology to take a physical inventory of the merchandise that will be the subject of the GOB Sale. The inventory allows the Merchant and Agent to agree on the quantity of the items being purchased. The physical inventory is a critical component given the practical difficulties in buying and selling thousands -- perhaps millions -- of individual, low cost items. In cases where a physical inventory cannot be completed prior to the sale, the parties may agree to base the inventory on "gross rings" of the register at the GOB Sale itself.

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<sup>8</sup> The GOB Sale guidelines are of particular interest to the landlords and the relevant attorneys general, as discussed in Section VII of this outline. Because the same landlords, attorneys general, debtors' counsel, and Agents appear in these matters in numerous cases and are familiar with each other's concerns, many of the issues that arise can be worked out quickly.

**D. Guaranteed Amount**

- The Guaranteed Amount is the minimum amount of money that the Agent guarantees the Merchant will receive, regardless of the outcome of the GOB Sale. It is typically expressed as a percentage of the retail price or the Merchant's cost of the inventory to be sold, rather than as an absolute dollar figure. In many cases, 75 to 80 percent of the Guaranteed Amount will be paid "up front" to the debtor/Merchant when the inventory is completed, which can greatly help a cash-strapped enterprise. The Agent may take a security interest to protect it in the event the Merchant is obligated to repay the advance payment of the Guaranteed Amount.

**E. Threshold**

- The threshold is the minimum value of goods that the Merchant guarantees the Agent is purchasing.

**F. Sharing**

- The Agency Agreement often contains a formula pursuant to which the Merchant may share in a percentage of the proceeds in excess of a stated amount. If the Guaranteed Amount is relatively high (perhaps as a result of active bidding at the auction), however, the upside Sharing may be eliminated.

**G. Augmentation**

- The Agency Agreement will specify if and to what extent the Agent will be permitted to sell goods other than the Merchant's in the GOB Sale. Augmentation can be used to create a product mix that will attract more customers or increase sales. It also can be used simply to give the Agent a higher return, allowing the Agent to offer the debtor/Merchant a more favorable deal. As discussed below, Augmentation is a controversial issue for many landlords and local and state authorities.

**VI. The Efficiency of a GOB Sale**

- A. But for the GOB Sale process, a Merchant seeking to dispose of inventory associated with unprofitable locations would need to spend endless hours and limited resources administering the sales process. Utilizing the GOB Sale process allows a Merchant to spend valuable time and energy focusing on its core business and operations at profitable locations, as well as to focus on its reorganization tasks.
- B. The Agent will have experience and expertise in conducting GOB Sales, which are very different from running a continuing retail operation. The amount of the discounts offered at the sale, as well as the timing and advertising of those discounts, is critical to achieve the highest yields. The Agent's experience will

also allow it to anticipate and respond quickly to issues that are likely to arise in the process.

- C. The Agent typically takes over any costs associated with the operation of the stores during the GOB Sale process, including paying lease expenses, and payroll and advertising costs.

## VII. The Law of GOB Sales in a Bankruptcy Context

- A. It is a critical component of the statutory construct of the Bankruptcy Code that debtors in possession operate their businesses to maximize recovery to their creditors. This goal would be hindered if debtors were required to adhere rigorously to state and local statutes regarding GOB Sales. Accordingly, Bankruptcy Courts must balance the Bankruptcy Code's goal of maximizing creditor recovery against important consumer protection, unfair business practice, environmental, and labor laws and regulations. Bankruptcy Courts are called upon to balance these competing concerns and enter orders that enforce some laws and provide relief from others.
- B. Many shopping center leases also contain terms that restrict GOB Sales, including express prohibitions against store closing sales. Bankruptcy Code §365(d)(3) requires the debtor to "timely perform all the obligations" under a lease that arise on and after the petition date.<sup>9</sup> This Bankruptcy Code section provides a basis to argue that lease provisions prohibiting GOB Sales are enforceable in bankruptcy. Nonetheless, Bankruptcy Courts have identified a number of exceptions to this ostensibly clear cut rule:
  - 1. In In re Ames Dept. Stores, Inc., the Bankruptcy Court declined to enforce a continuous operation provision where the lease authorized the assignment and subletting with the landlord's consent and the making of alterations, additions and improvements.<sup>10</sup> The Court reasoned that such provisions would require at least a brief cessation of business, and thus the lease would be internally inconsistent if it were interpreted to require continuous operation.<sup>11</sup>
  - 2. In In re R.H. Macy, the same Court denied a landlord's motion for damages based on its allegation that the debtor breached its lease by, among other things, failing to operate its store continuously.<sup>12</sup> In

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<sup>9</sup> 11 U.S.C. § 365(d)(3).

<sup>10</sup> In re Ames Dept. Stores, Inc., 136 B.R. 357, 359 (Bankr. S.D.N.Y. 1992).

<sup>11</sup> Id.

<sup>12</sup> In re R.H. Macy & Co., Inc., 170 B.R. 69, 71 (Bankr. S.D.N.Y. 1994).

particular, the relevant lease provision required the debtor to operate continuously as a “Bullock’s” for the first fifteen years of the lease. The landlord argued that the covenant to stay open was a Bankruptcy Code §365(d)(3) requirement, which required timely performance under the Bankruptcy Code. The Court held that the continuous use provision was unenforceable against the debtor because it conflicted with the Bankruptcy Court’s previous sale order authorizing the store closing and the debtor’s obligation to maximize estate assets for the benefit of all creditors.

### C. **Limitations on GOB Sales in Bankruptcy**

1. **Fair Advertising.** Bankruptcy Courts have held that in conducting GOB Sales, debtors must be honest in their advertising and generally cannot violate regulations that affect public safety. For example, in In re Willis Furniture Co., Inc., the Bankruptcy Court authorized augmentation with non-debtor inventory but refused to permit the sale to be advertised as a “Bankruptcy Sale,” “Court Ordered Sale,” or the like, because such advertisement was misleading.<sup>13</sup> Bankruptcy Courts may also require disclosure of any augmentation and a posted notice that all sales are final.
2. **Landlord and Co-Tenant Protections.** While Bankruptcy Courts have almost unanimously approved GOB Sales in some form or another, those courts have acknowledged the need to place certain parameters on such sales to protect shopping center landlords and their other tenants.<sup>14</sup> Again, the parties who appear frequently in Bankruptcy Court on these matters have developed standard provisions for orders approving GOB Sales. For example, the Agent often agrees to:
  - a) Use only signs that are professionally prepared and not use flashing lights;
  - b) Preserve the landlord’s premises, including any fixtures that belong to the landlord under the lease terms;
  - c) Advertise and conduct the GOB Sale only within the Merchant’s premises, and not in common areas; and
  - d) Maintain the Merchant’s regular business hours.
3. **Augmentation.** One area of particular controversy is augmentation of a debtor’s inventory. It is not uncommon for landlords to request that GOB

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<sup>13</sup> In re Willis Furniture Co., Inc., 148 B.R. 691, 694 (Bankr. D. Mass. 1992) .

<sup>14</sup> In re Ames Dept. Stores, Inc., 136 B.R. at 359.



Sales not be supplemented with goods not already present at the store. A landlord may claim that the augmented inventory violates an exclusive use provision of another tenant in the shopping center, particularly if the augmented inventory is not of the same quality and type as the inventory normally sold at the location.

Local and state authorities also dislike augmentation because it can confuse the public. In addition to seeking assurance that the merchandise is of the same quality and type as the debtor's inventory, these authorities request prominent disclosure of augmented goods and assurance that augmentation will not extend the term of the GOB Sale.

Bankruptcy Courts tend to be more lenient in allowing augmentation to the extent that the augmented inventory is from the Merchant's other stores. The rationale for this distinction is that, as the GOB Sale process nears an end, the Agent wants to consolidate inventory in just a few stores so that it does not need to keep paying the expenses for all locations. Where the proposed augmentation is excessive and primarily in the best interests of the Agent rather than the estate, however, Bankruptcy Courts are more inclined to prohibit it.

a) In In re North Carolina Furniture Galleries of Milford, L.L.C., a chapter 11 debtor that was a furniture retailer located in an area known as "furniture row" filed a first day emergency motion seeking approval of a GOB Sale.<sup>15</sup> The proposed Agent was to purchase the entirety of the debtor's inventory at 100% of the debtor's cost, a total of approximately \$180,000. The motion proposed augmenting the inventory with an additional \$3,000,000 in new inventory, which would be sold "as is."<sup>16</sup> The attorney general was concerned about the degree of the proposed augmentation and the impact that the sale would have on the 14 nearby furniture stores that intended to stay in business.

(1) Applicable state law normally prohibits additions to inventory in contemplation of a closing-out sale, but there is an exception for sales governed by a court of competent jurisdiction. Applicable local bankruptcy rules require that

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<sup>15</sup> In re North Carolina Furniture Galleries of Milford, L.L.C., United States Bankruptcy Court for the District of Connecticut, Case No. 02- 32743.

<sup>16</sup> Augmentation is often a particularly important element of GOB Sales in the furniture business, where many normal sales are "custom order" and the Merchant's existing inventory may not be sufficient to conduct a successful sale.

a liquidation sale must be limited to the debtor's property, unless otherwise ordered by the court.

- (2) In light of these restrictions, the Bankruptcy Court determined that the augmentation could not be approved unless there was a significant and certain benefit to the estate. The Court denied the GOB Sale motion because, while there might be some additional recovery by secured creditors, it was speculative at best that any recovery would trickle down to unsecureds, and the proposed sale only guaranteed a benefit to the Agent.

**D. Interplay of Nonbankruptcy Law.** The existence of a Bankruptcy Court order approving the GOB Sale guidelines and the court's continuing jurisdiction over any disputes that arise during the GOB Sale itself are invaluable in dealing with local authorities. Absent these protections, the Agent may have to respond to the sheriff or local court in multiple jurisdictions on very little notice.

1. **State Statute.** Some GOB Sale statutes and regulations are expressly not applicable if the sale is conducted pursuant to a Bankruptcy Court order. For example, Indiana specifically exempts Bankruptcy Court approved sales from the state GOB Sale licensing requirement.<sup>17</sup>
2. **Supremacy Clause.** Even where a state statute does not expressly carve out Bankruptcy Court approved GOB Sales, Bankruptcy Courts have the authority to approve sales that may otherwise be prohibited by state and local statutes, based on general Supremacy Clause theories. The Supremacy Clause is implicated when state laws and regulations interfere with or contravene federal bankruptcy laws. Thus, courts have held consistently that the federal bankruptcy laws preempt any contravening state and local regulations.<sup>18</sup> The Supreme Court has found, however, that

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<sup>17</sup> “Unless a license for such sale has been issued and has become effective in accordance with this chapter, no person, firm, limited liability company, corporation, or association engaged in the business of selling goods at retail shall directly or indirectly advertise, or cause to be advertised, represent, or cause to be represented, or hold out to the public in any manner that any sale of goods is a going out of business, removal of business, or fire or other altered goods sale, or that it is a sale of goods that have been obtained through, as a result of, or by reason of any of the situations and contingencies named in the definitions of going out of business sale, removal of business sale and fire or other altered goods sale as set forth in section 1 of this chapter; however, this chapter shall not apply to any sales directly ordered by any court or referee in bankruptcy, or to any person acting under the direction and supervision of state or federal courts in the course of their official duties.” Ind. Code Ann. § 25-18-1-2.

<sup>18</sup> See, e.g., Perez v. Campbell, 402 U.S. 637 (1971) (the Supreme Court invalidated under the Supremacy Clause a state law which called for the suspension of an individual's driver's license if he failed to satisfy a judgment arising out of operation of a motor vehicle, even if the judgment had been discharged in bankruptcy); Nelson v. La Crosse County Dist. Atty., 301 F.3d 820, 836 (7<sup>th</sup> Cir. 2002) (“[b]ecause of Article I's grant of exclusive power to the federal government to legislate in the bankruptcy context, and by virtue of the Supremacy Clause, (Continued...)”)

the Bankruptcy Code does not preempt state law that is specifically designed to protect public health or safety.<sup>19</sup>

3. **28 U.S.C. § 959(b)**. 28 U.S.C. § 959(b)<sup>20</sup> requires trustees and debtors in possession to comply with state law when managing property in a bankruptcy proceeding.

a) Certain courts have held that 28 U.S.C. § 959(b) does not apply to debtors or their Agents liquidating assets.<sup>21</sup>

b) In a case that did not involve a GOB Sale, however, the Supreme Court has at least looked to 28 U.S.C. § 959(b) for guidance in liquidating assets:

28 U.S.C. § 959(b) provides additional evidence that Congress did not intend for the Bankruptcy Code to preempt all state laws. Section 959(b) commands the trustee to ‘manage and operate the property in his possession ... according to the requirements of the valid laws of the State.’ Petitioners have contended that § 959(b) is relevant only when the trustee is actually operating the business of the debtor, and not when he is liquidating it. Even though § 959(b) does not directly apply to an abandonment under § 554(a) of the Bankruptcy Code--and

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a State may very well have its rights affected by a bankruptcy proceeding”); In re Murphy, 271 F.3d 629, 632 (5<sup>th</sup> Cir. 2001) (bankruptcy law operates by virtue of the Supremacy Clause); Chao v. Hospital Staffing Services, Inc., 270 F.3d 374, 384 (6<sup>th</sup> Cir. 2001) (“[i]f a state court and the bankruptcy court reach differing conclusions as to whether the automatic stay bars maintenance of a suit in the non-bankruptcy forum, the bankruptcy forum’s resolution has been held determinative, presumably pursuant to the Supremacy Clause”); State of Md. v. Antonelli Creditors’ Liquidating Trust, 123 F.3d 777, 781 (4<sup>th</sup> Cir. 1997) (“any bankruptcy provision enacted within constitutional authority applies directly to a bankruptcy estate and takes precedence over conflicting state provisions by reason of the Supremacy Clause”).

<sup>19</sup> Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl. Protection, 474 U.S. 494, 507 (1986) (the Bankruptcy Code does not preempt a state statute that is “reasonably designed to protect the public health or safety from identified hazards”). See also Saravia v. 1736 18th Street, N.W., Ltd. Partnership, 844 F.2d 823, 827 (App. D.C. 1988).

<sup>20</sup> Which states: “Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do so if in possession thereof.”

<sup>21</sup> See, e.g., In re Borne Chemical Co., Inc., 54 B.R. 126, 135 (Bankr. D. N.J. 1984) (28 U.S.C. § 959(b) applies only where the property is being managed or operated for the purpose of continuing operations); State of Mo. v. U. S. Bankruptcy Court for E. D. of Arkansas, 647 F.2d 768, 778 n.18 (8<sup>th</sup> Cir. 1981) (same); In re Valley Steel Products Co., Inc., 157 B.R. 442, 447 (Bankr. D. N.J. 1989) (same).

therefore does not de-limit the precise conditions on an abandonment--the section nevertheless supports our conclusion that Congress did not intend for the Bankruptcy Code to pre-empt all state laws that otherwise constrain the exercise of a trustee's powers.<sup>22</sup>

- c) Moreover, and with regard to 28 U.S.C. § 959(b) and GOB Sales in particular, one court has stated,

The sphere of bankruptcy is a fundamentally financial sphere in which assets are either reduced to cash and distributed or are used to facilitate the reorganization of the debtor's financial affairs. To be sure, the Congress has provided the debtor with some potent weapons to fend off creditors. Nevertheless, the sphere is limited, as is apparent from the various exceptions to the automatic stay accommodating criminal prosecutions and most exercises of police and regulatory powers.<sup>23</sup>

- d) In In re House of Fabrics, Inc., both the State of California and the State of Washington argued that the debtor's proposed GOB Sale failed to meet certain state and local regulations that applied pursuant to 28 U.S.C. § 959(b).<sup>24</sup> The Bankruptcy Court held that it had the authority to exempt debtors from complying with state and local laws in certain circumstances. The Court further stated that 28 U.S.C. § 959(b) did not prevent it from enforcing exemptions to state and local laws where such exemptions would cause only minor interference with the purposes of the relevant regulation and where the exemption was justified for the legitimate business purposes of the debtor.<sup>25</sup>

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<sup>22</sup> Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494, 505 (1986). See also In re Wall Tube & Metal Prods. Co., 831 F.2d 118, 122 (6<sup>th</sup> Cir. 1987) (following Midlantic in applying an environmental law and expressing doubt as to the argument that 28 U.S.C. § 959(b) does not apply to liquidations).

<sup>23</sup> In re White Crane Trading Co., Inc., 170 B.R. 694, 702 (Bankr. E.D. Cal. 1994).

<sup>24</sup> In re House of Fabrics, Inc., United States Bankruptcy Court for the Central District of California, Case No. 94-50060.

<sup>25</sup> Although the debtor in House of Fabrics was exempt from certain state and local regulations regarding its GOB Sale, the Court did not exempt the debtor from complying with certain other state and local regulations governing the advertisement of the sale. Id.

- e) While it is clear that courts possess the authority to preempt state and local regulations, this authority is not unlimited and certain nonbankruptcy rules regarding GOB Sales will remain applicable, especially to the extent that such rules are concerned with public health and safety.

## **VIII. Conclusion**

In any store closing situation, there tend to be four somewhat competing interests:

1. the debtor's fiduciary obligations to maximize estate assets for the benefit of creditors;
2. the right of the landlord to receive the benefit of its bargain;
3. the right of the public to be adequately protected against deceptive trade practices and other hazards; and
4. the right of other businesses to be protected against unfair business practices.

The Bankruptcy Code and the Bankruptcy Courts attempt to balance each of these interests, to the benefit of all the parties. In doing so and by permitting GOB Sales, Bankruptcy Courts tend to lean in favor of the estate and the debtor's duty to maximize assets for the benefit of the creditors.