Is the Growth of eCommerce During Covid-19 Creating the Perfect Storm that Will Destroy the Retail Industry as We Knew It?

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We unfortunately all know too well the devastation that the Covid-19 Pandemic has thus far caused the human body and spirit. However, we are only just beginning to get a sense of the long-lasting economic damage that the "brick and mortar" retail industry has suffered because of Covid-19. One can legitimately query whether the Pandemic will result in the large chain store "brick and mortar" shopping being supplanted by eCommerce shopping.

Since the establishment of CompuServe by Dr. John R. Goltz and Jeffrey Wilkins in 1969, eCommerce began its competition with physical shopping as the means by which consumers purchase a myriad of goods ranging from soup to furniture. The sustained growth of eCommerce over the last fifteen (15) years is highlighted by many events, most notably the launching in 2005 of Amazon Prime membership which enabled customers to purchase a wide array of products with free two-day shipping after payment of an annual fee, and Apple's 2014 launch of Apple Pay, an online payment application.

According to Adobe Analytics, in 2019 Cyber Monday resulted in a new record of more than $9 billion in sales, marking the first day in history that consumers spent over $3 billion using their smartphones. According to Forbes, U.S. shoppers spent over twenty (28) eight billion dollars on retail websites over the five-day period from Thanksgiving to Cyber Monday in 2019, up 17.7% during the same holiday weekend in 2018.

As if the world of "brick and mortar" retail had not suffered enough from the growth of eCommerce, the onset of the Covid-19 virus pandemic in early 2020 has created a perfect storm combining the economic trends, described above, with the forced shutdown of retail establishments across the world, creating an existential crisis for both large and small "brick and mortar" retail businesses. These events have not only severely impacted the traditional retail industry but may have a long-lasting impact on the commercial real estate industry.

Iconic brands in the retail and service industry have commenced Chapter 11 cases amid the Covid-19 pandemic. Examples of these recent Chapter 11 filings include: Lord & Taylor; Brooks Brothers; Lucky Brand Dungarees; Neiman Marcus Group; J. Crew Group; J.C. Penney; Pier 1 Imports, Inc; GNC Holdings; RTW Retailwinds Inc. (the parent company of New York & Co.); ALDO Group; Muji U.S.A. Ltd.; Tuesday Morning; John Varvatos Enterprises; True Religion; J

Hilburn; 24 Hour Fitness; Chuck E. Cheese; Le Pain Quotidien; Garden Fresh Restaurant Corp. (parent company of Souplantation a/k/a/ Sweet Tomatoes); and Sur La Table.

In these "mega cases", many of the companies are using the bankruptcy laws as a means to sell their business as a going concern, the main assets of which may be their intellectual property, to competitors or investors looking to set up and/or enhance preexisting online platforms. For example, Pier 1 is seeking approval of the sale of its intellectual property, data, and other assets related to its eCommerce business to Retail Ecommerce Ventures LLC. If this sale is approved, the prospective purchaser plans to make Pier 1 an online-only business, as Pier 1's "brick and mortar" retail operations continue to wind down.

Alternatively, some of these large retailers are using Chapter 11 to stay in business while using the bankruptcy process to restructure their operations by closing unprofitable stores and rejecting burdensome leases, while conversely assuming leases for their profitable locations. The proceeds generated by the liquidation of inventory in the underperforming stores is going to be used to enhance the overall cash position of these retailers. In those cases where the debtors are in a complete liquidation mode, they are using the bankruptcy process to assume and assign certain of their leases to a third party, even over the objection of the landlord if the statutory criteria are met, and rejecting the leases that are not marketable.

Because of the gravity of the economic crisis, bankruptcy courts have even granted debtors the extraordinary remedy of suspending their cases under sections 305(a)(1) and/or 105(a)(2) of the Bankruptcy Code, thus temporarily excusing them from paying rent to landlords while still operating. The effect of this is for landlords to "bankroll" the debtor's reorganization efforts, at least for a period of time.

While "brick and mortar" retailers and restaurants are exercising their statutory rights to seek relief under Chapter 11, the seismic impact of these cases is being felt by the commercial real estate industry, especially owners of shopping malls where many of these debtors are either anchor tenants or integral components of the shopping center. Savvy commercial real estate operators are cognizant of the ripple effect that this wave of bankruptcy cases will have upon their businesses. For example, The Simon Property Group, the biggest mall operator in the United States, is currently trying to terminate its $3.6 billion deal to acquire Taubman Centers, which owns and operates about two dozen high-end shopping centers.

While it is clear that there is an existential crisis facing the "brick and mortar" retail industry, one should not give up all hope that this facet of the industry is doomed. With a well thought out and executed Chapter 11 case, many of these “brick and mortar” businesses may be able to emerge as “leaner and meaner” operations after using the bankruptcy process. Businesses with liabilities of $7,500,000 or less, like Texas based Twisted Root Burger Co., are also using the new streamlined and less expensive Subchapter V, a new part of the Chapter 11 small business bankruptcy laws, to reorganize.

“Brick and mortar” retail store chains should also continue to incorporate elements of eCommerce that have become a part of their day-to-day operations as a result of the pandemic, such as: on-line ordering with curbside pickup; maintaining strict social distancing guidelines; implementing mandatory mask wearing policies; scheduling in-store consultations by appointment, in lieu of open shopping; requiring the mandatory use of hand sanitizer before customers try on items like jewelry or watches; and implementing contactless payment methods, like Apple Pay. These changes, along with the collaboration between “brick and mortar” and eCommerce retailers, such as Kohl’s now accepting returns for items purchased on Amazon, may very well save the retail as we knew it before the Covid-19 Pandemic.