

Prepackaged Retail Cases in the Post-Amazon and COVID-19 Era

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Prepackaged chapter 11 cases “prepacks” save debtors time and money. Prepacks are now common, and the practice has gained traction in the retail sector over the last five years. The increase in retail prepacks is likely due to the challenges brick-and-mortar retail companies are facing with a technology-driven consumer marketplace and the COVID-19 Pandemic. This paper (i) evaluates the benefits and challenges of prepackaged plans, (ii) describes recent retail prepacks and pre-negotiated plans, (iii) highlights considerations unique to retail prepacks, and (iv) provides tips for successful retail prepacks.

A. Prepack Variations

A prepack is a deviation from a traditional reorganization that is negotiated and accepted by creditors prior to the petition date.¹ The prepack has origins in the 19th-century equity receivership practice.² By enacting the Bankruptcy Code in 1978, Congress consolidated the pre-code Chapters X and XI, thereby abandoning the Chapter X prohibition on prepackaged plans. Sections 1102(b)(1), 1121(a), and 1126(b) of the Bankruptcy Code promote prepackaged plans by allowing plans to be simultaneously filed with petitions, authorizing the appointment of prepetition committees into official committees, and allowing votes solicited pre-petition to be counted and considered for confirmation.³

There are multiple variations of prepack cases. The traditional prepack, also referred to as a “single-track prepack” involves the pre-negotiation and solicitation of votes, but the debtor “does

¹ See Friedland., *Out-of-Court Workouts Prepacks and Pre-Arranged Cases A Primer*, AM. BANKR. INST. (Apr. 1, 2005).

² See 1 Collier’s on Bankruptcy ¶ 21.04 (16th ed. 2019); Levin and Moore, *Bankruptcy and Reorganization: A Survey of Changes, II*, 5 U. CHI. L. REV. 219, 225 (1938); Dunne, O’Donnel, and Almeida, *Pre-packaged Chapter 11 in the United States: An Overview*, Milbank LLP (Dec. 11, 2019).

³ See 11 U.S.C. §§ 1102(b)(1), 1121(a), 1126(b); see also FED. R. BANKR. P. 3018(b) (authorizing voting on chapter 11 plans prior to commencement of the case).

not attempt a simultaneous exchange offer.”⁴ When the debtor does attempt a simultaneous exchange offer, this is referred to as a “dual-track” prepack.⁵ The debtor will aim to obtain the required consent for the out-of-court exchange offer, but if the debtor does not obtain the proper number of accepting votes, the debtor utilizes the accepting votes to file the petition and prepack plan.⁶ The third approach involves a hybrid of the single and dual track processes and is often referred to as a “partial prepack.” In a partial prepack, the debtor will solicit the votes of key creditors before filing the petition. After filing the petition and plan, the debtor subsequently solicits the votes of the other creditors in the case.⁷ In addition to these variations, a true prepack is a case where the plan is pre-negotiated and votes are solicited prior to filing the petition, but many cases are loosely referred to as prepacks when votes are partially solicited or the plan is pre-negotiated.

B. Benefits and Risks in Prepacks

While each chapter 11 case is unique, there are several advantages for a debtor filing a prepack. Perhaps the most apparent benefit of a prepack is that it shortens and simplifies the restructuring process for the debtor. Moreover, prepacks allow for a quick turnaround time. It is common now for prepacks to last between 45 and 60 days, with some debtors achieving

⁴ Dunne, O’Donnel, and Almeida, *Pre-packaged Chapter 11 in the United States: An Overview*, supra note 2 (citing *In re Elec. Components Int’l, Inc.*, Case No. 10-11054 (KJC) (Bankr. D. Del. 11 May 2010); *In re IWO Holdings, Inc.*, Case No. 05-10009 (P JW) (Bankr. D. Del. 9 February 2005); *In re Choice One Commc’n Inc.*, Case No. 04-16433 (RDD) (Bankr. S.D.N.Y. 9 November 2004); *In re Seegrid Corp.*, Case No. 14-12391 (MFW) (Bank. D. Del. 20 January 2018); and *In re Sungard Availability Servs Capital, Inc.*, Case No. 19-22915 (RDD) (Bankr. S.D.N.Y. 2 May 2019)).

⁵ *Id.*

⁶ *Id.* (citing *In re FullBeauty Brands Holdings Corp.*, Case No. 19-22185 (RDD) (Bankr. S.D.N.Y. 3 February 2019); *In re Pioneer Fin. Corp.*, Case No. 99-11404 (LBR) (Bankr. D. Nev. 1999); *In re MTS, Inc.*, Case No. 04-10394 P JW (Bankr. D. Del. 4 February 2004); and *In re InSight Health Servs. Holdings Corp.*, Case No. 07-10700 (BLS) (Bankr. D. Del. 29 May 2007)).

⁷ *Id.*

confirmation within as little as 24 hours.⁸ In addition to time savings, a prepack will save debtors from paying administrative expenses for a prolonged period of time. Further, the debtor more easily maintains control and avoids exclusivity issues in a prepack due to the general shortened timeline in the case.

Prepack advantages are significant, but there are a few noteworthy risks associated with these cases as well. First, prepacks present a risk that creditors may take unfair advantage of the debtor or otherwise take aggressive positions on prepetition collections. Second, there is an inherent risk that creditors may attempt to thwart the process by refusing to cooperate in prepetition negotiations. Third, even after filing the case, there is a risk that creditors or other parties-in-interest will attempt to bust the prepack post-petition. Fourth, prepacks present a chance of insufficient negotiating time due to the debtor’s limited liquidity or other issues, such as high interest payments and accelerated debt.

While the risks should not be ignored, the benefits to prepacks generally outweigh them, especially given the advantage of a quick turnaround time. The below chart summarizes prepack chapter 11 cases filed in the last three years in the District of Delaware, the Southern District of New York, the Southern District of Texas, and the Eastern District of Virginia in which the debtors achieved plan confirmation in one month or less.

Case	Court	Petition Date	Conf. Date	Days to Conf.	Objections	GUCs
<i>In re Rand Logistics</i> , No. 18-10175	D. Del. - Shannon	1/29/18	2/28/18	30	UST and lender	Unimpaired

⁸ See *In re FullBeauty Brands Holdings Corp.*, Case No. 19-22185 (RDD) (Bankr. S.D.N.Y. 2019) (obtaining confirmation within 24 hours; see also *In re Belk, Inc.*, Case No. 21-30630 (MI) (Bankr. S.D. Tex. 2021) (same).

<i>In re Joerns WoundCo</i> , No. 19-11401	D. Del - Dorsey	6/24/19	7/25/19	31	Tax Authorities	Unimpaired
<i>In re Arsenal Energy Holdings</i> , No. 19-10226	D. Del. - Shannon	2/4/19	2/13/19	9	None	Unimpaired
<i>In re Deluxe Ent. Servs.</i> , No. 19-23774	SDNY - Drain	10/03/19	10/25/19	22	None	Unimpaired
<i>In re Sungard Availability Servs.</i> , No. 19-22915	SDNY - Drain	5/2/19	5/3/19	1	UST	Unimpaired
<i>In re FullBeauty Brands Holdings</i> , No. 19-22185	SDNY - Drain	2/3/19	2/5/19	2	UST	Unimpaired
<i>In re Utex Industries</i> , No. 20-34932	SDTX - Jones	10/8/20	10/23/20	15	1 lender objected	Unimpaired
<i>In re Mood Media</i> , No. 20-33768	SDTX - Isgur	7/30/20	7/31/20	1	1 lender objected	Unimpaired
<i>In re Sheridan Holdings</i> , No. 20-31884	SDTX – Jones	3/23/20	3/24/20	1	None	Unimpaired
<i>In re Jones Energy</i> , No. 19-32112	SDTX - Jones	4/14/19	5/6/19	22	2 and UST	Unimpaired
<i>In re Tailored Brands, Inc.</i> , 23-33900	SDTX - Isgur	8/2/20	11/13/20	103	6	Impaired & Objected
<i>In re Guitar Center</i> , No. 20-34657	EDVA – Huennekens	11/21/20	12/17/20	26	Landlords	Unimpaired
<i>In re Belk, Inc.</i> , No. 21-30630	SDTX – Isgur	2/23/21	2/24/21	1	UST	Unimpaired

As the chart above illustrates, the restructuring world has seen an increase in prepacks, and quick ones at that. According to the Debtwire Restructuring Database, chapter 11 proceedings in 2020 were close to evenly divided between “freefall” cases and pre-packaged or pre-arranged cases. “This stands in sharp contrast to 2019, when there were three times as many freefall cases

as pre-packaged or pre-arranged filings. This suggests that, in 2020, companies facing an inability to refinance or take out existing debt—possibly due to the impact of COVID-19—more often chose to address those immediate balance sheet issues through pre-packaged or pre-arranged cases, rather than tinker too heavily with their operations and business models given the business and asset value uncertainties related to the pandemic.”⁹

C. Recent Retail Prepacks in Texas

As noted in Section B, many of the prepacks with a less than one-month turnaround time were retail cases. It is no secret that the retail industry has faced many challenges over the past decade, largely due to the increased consumer demand for online shopping powerhouses.¹⁰ In addition, the global shutdown caused by the COVID-19 pandemic further stressed the retail industry cables by causing distribution and consumer foot traffic to grind to a screeching halt. Because of these industry challenges, several large retailers filed chapter 11 in 2020, with many filing prepacks to achieve a quick turnaround. Due to size and complexity, some of the larger retail prepacks took between four and eight months from filing to confirmation, which is still no simple feat.¹¹ Below are case summaries detailing notable retail prepacks (of varying degrees, including partial prepacks) filed in Texas in 2020 and 2021.

- ***In re J. Hilburn, Inc.***, Case No. 20-31308 (HDH) (Bankr. N.D. Tex. April 30, 2020).

J. Hilburn, Inc. is a retail clothing company that creates luxury, custom-made menswear. Prior to its 2020 restructuring, J. Hilburn incurred \$6.1 million in funded debt owed to

⁹ Guzina, Bojan & O’neill, *Andrew*, *Chapter 11 cases soared in 2020, with more distress likely in 2021*, White & Case (Feb. 25, 2021).

¹⁰ Stan Friedlander, *The Effects of COVID-19 Will Likely Further Cement Amazon’s Dominance in Retail*, INDUS. INSIGHTS, <https://glginsights.com/articles/the-effects-of-covid-19-will-likely-further-cement-amazons-dominance-in-retail/> (June 24, 2020).

¹¹ *In re Neiman Marcus Grp. Ltd.*, Case No. 20-32519-DRJ (Bankr. S.D. Tex. May 7, 2020) (obtaining confirmation 120 days after filing); *In re J.C. Penney Co., Inc.*, No. 20-20182 (DRJ) (Bankr. S.D.T.X. May 15, 2020) (obtaining confirmation 215 days after filing).

Silicon Valley Bank. This debt consisted of a \$3.1 million senior term loan and a fully drawn revolving line of credit secured by substantially all of the debtor's assets. J. Hilburn also had \$2.74 million outstanding on a loan from Escalate Capital Partners, which was subordinate to the Silicon Valley Bank debt. J. Hilburn owed approximately \$12.75 million in unsecured notes subordinate to the bank debt. Finally, J. Hilburn owed approximately \$8.6 million in outstanding trade debt.

J. Hilburn's sales dramatically decreased due to the COVID-19 pandemic, causing liquidity constraints that impaired its operations. Due to these market challenges, J. Hilburn entered into a restructuring support agreement ("RSA") with its largest trade vendor, The Apparel Group, Ltd, Silicon Valley Bank, Escalate, the noteholders, and certain affiliates.

While the debtors did not file the chapter 11 plan on the petition date, it was pre-negotiated, thereby enabling the debtors to file it within two weeks of filing the petition. These pre-planning efforts also resulted in the debtors exiting bankruptcy at the end of two months.

- ***In re Neiman Marcus Grp. Ltd LLC***, Case No. 20-32519 (DRJ) (Bankr. S.D. Tex. May 7, 2020).

Neiman Marcus is a luxury clothing retailer that, prior to its 2020 restructuring, had approximately \$5.1 billion in funded debt. This debt included a \$900 million senior secured revolving credit facility, a \$100 million last-out term loan facility, a \$2,253.1 million senior secured term loan facility, \$561.7 million in second lien notes, \$730.5 million in senior secured 8% third lien notes, \$497.8 million 8.75% third lien notes, \$80.7 million 8% senior cash pay notes, \$56.6 million unsecured PIK toggle notes, and \$125 million senior debentures.

Neiman Marcus temporarily closed all stores in 2020 due to the COVID-19 pandemic, following a recent recapitalization in 2019 where the debtors extended the maturities of its participating debt by three years. This closure negatively impacted liquidity and capital structure. The company ultimately signed a RSA with 78% of their first lien lenders, 99% of second lien lenders 70% of third lien lenders, 78% of debentures, and 100% of the direct equity ownership.

While the debtors did not file the plan on the petition date, it was pre-negotiated, thereby enabling the debtors to file it within one month of filing the petition. These pre-planning efforts also resulted in the debtors exiting bankruptcy at the end of four months.

- ***In re J. C. Penney Co., Inc.***, Case No. 20-20182 (DRJ) (Bankr. S.D. Tex. May 15, 2020).

J.C. Penney is a clothing retailer that, prior to its 2020 restructuring, had approximately \$4.9 billion in funded debt, including approximately \$1.179 billion from the first lien revolving credit facility, a \$1.521 billion first lien term loan, \$500 million in first lien notes, \$400 million in second lien notes, and \$1.318 billion in unsecured notes.

Due to the COVID-19 pandemic, J.C. Penney temporarily closed all stores and offices. The company drew down on its credit facility and furloughed many employees. To ensure further operations, the debtors entered into a RSA with holders of 70% of its first lien loan and note claimants.

J.C. Penney's plan was partially pre-negotiated, but the RSA itself contemplated further negotiations among the stakeholders; therefore, the votes were not solicited before the filing. The J.C. Penney plan was confirmed 215 days after the petition date.

- ***In re Tailored Brands, Inc.***, Case No. 23-33900 (MI) (Bankr. S.D. Tex. Aug. 2, 2020)

Tailored Brands owns Men's Wearhouse, a clothing retailer specializing in men's formal wear, as well as K&G Fashion Superstore, Moores Clothing for Men, Twin hill, Joseph Abboud, and Joseph A. Bank. Prior to its 2020 restructuring, Tailored Brands had approximately \$1.4 billion outstanding in funding debt, including: \$375 million on a line balance under a first lien revolving credit facility, \$22.9 million letter of credit outstanding under the first lien revolving credit facility, \$877.4 million outstanding on a first lien term loan, and \$173.8 million outstanding in senior unsecured notes.

Due to the COVID-19 pandemic, Tailored Brands temporarily closed its stores and the slow reopening pressured the company's liquidity position. In response to these issues, Tailored Brands entered into a RSA with an unspecified amount of its creditors.

Tailored Brands' plan was partially pre-negotiated, but the RSA itself contemplated further negotiations. The plan was confirmed 103 days after the petition date.

- ***In re Belk, Inc.***, Case No. 21-30630 (MI) (Bankr. S.D. Tex. Feb. 23, 2021).

Belk, Inc is a truly unique retail prepack with timing similar to *In re FullBeauty Brands*. The clothing retail company filed chapter 11 on February 23, 2021 with 14 affiliated debtors in the Southern District of Texas.¹² The debtors filed with \$1.9 billion in outstanding funded debt, comprised of \$357.5 million outstanding on an ABL facility, a \$999.4 million first lien term loan, and \$550 million outstanding on a second lien term loan. In addition to this funded debt, Belk also had \$83.83 million in outstanding capital lease obligations.

To address the challenges caused by the pandemic, Belk entered into a RSA with its sponsor, holders of 75% of the first lien term loan claims, and holders of 100% of the second lien term loan claims. Under the terms of the RSA, Sycamore Partners retained majority control of Belk. Moreover, Belk had obtained exit financing commitments for

¹² *In re Belk, Inc.*, Case No. 21-30630, *Langley First Day Declaration* [Docket No. 25].

\$225 million in new capital from Sycamore Partners, leading global investment firms KKR and Blackstone Credit and certain existing first lien term lenders.

Belk also obtained an extension of the early consent deadline for additional lenders to provide commitments for the \$225 million of new capital. Members of an ad hoc crossover lender group led by KKR Credit and Blackstone Credit (the 'Ad Hoc Crossover Lender Group') and other participating lenders acquired a minority ownership in Belk.¹³

Belk solicited votes on January 26, 2021, with a voting deadline of February 5, 2021. The debtors requested an expedited confirmation timeline on the grounds that: (a) nearly all debt holders who met the bankruptcy code threshold agreed to support the plan and the allowed claims of other creditors would be unimpaired; (b) the Debtors were in an extremely fragile liquidity state with approximately \$7 million in unrestricted cash; (c) the debtors lacked committed postpetition financing, and (d) delay would jeopardize the transaction that the Debtors' anticipated.

The Plan was confirmed within 24 hours of filing, but not without certain procedural protections in place for parties-in-interest. Judge Isgur entered a Due Process Preservation Order¹⁴ that provided the following:

- Each person and governmental unit had until March 31, 2020 to elect to opt out of the releases in the Plan/Confirmation Order.
- The Debtors prepared an opt out notice and served same on each "Releasing Party" along with a copy of the Confirmation Order.
- The exculpation provisions in the Plan and Confirmation Order were limited to the exculpations permitted by the Fifth Circuit in *In re Pacific Lumber*.¹⁵
- Any person or governmental unit alleging inadequate notice of the Plan and an opportunity to object to the Confirmation Order could file an objection with the Court by March 31, 2021.¹⁶

D. Retail Prepack Considerations

The success of the retail prepacks noted above were largely due to the immense planning and preparation on the part of the debtors' professionals. For any retail case, the possibility of a prepack should at least be considered during the pre-petition phase of the case. In addition to the

¹³ *Id.*

¹⁴ *Id.* at *Due Process Preservation Order* [Docket No. 62].

¹⁵ *Id.* (citing *In re Pac. Lumber Co.*, 584 F.3d 229 (5th Cir. 2009)).

¹⁶ *Id.*

general prepack advantages noted in Part B, there are unique prepack advantages for retail debtors. For example, a prepack enables the retail debtor to provide assurances to suppliers and customers of the exit strategy and business continuity, which helps to preserve vendor and consumer loyalty. Moreover, the debtor can provide transparency at the onset of the case to trade creditors, which usually includes explaining that the claims are unimpaired. This transparency aids to avoid disruption of the debtor's inventory delivery/supply chain model.

Even the most well thought out and meticulously planned cases face challenges, especially in the retail sector. Prepack challenges for retail debtors include (but are certainly not limited to) (a) Bankruptcy Code Section 365, (b) consumer protection, unclaimed property, and tax considerations, and, as noted in *In re Belk*, (c) due process concerns for the creditors and other parties-in-interest.

i. Section 365

Even in a traditional chapter 11, Section 365(d)(4) of the Bankruptcy Code creates a challenging timeframe for retail debtors to adjust operations while working expeditiously toward an exit.¹⁷ Research indicates that Section 365(d)(4) is a contributing factor to less favorable lending terms to retail debtors, including shortened DIP expiration dates and additional restrictions in credit agreements.¹⁸ When making business determinations under Section 365, most retail debtors must conduct an in-depth profitability analysis of their store locations to determine the leases they will seek to assume. This analysis can be complicated and may be particularly unpredictable due to the pandemic. Typically, retail debtors use potential rejections to renegotiate the lease terms

¹⁷ 11 U.S.C. § 365(d)(4).

¹⁸ Feldsher and Dendinger, "Retail Bankruptcies: Threading the Needle in a Tattered Industry," J. CORP. RENEWAL.

with their landlords. The negotiation process is time consuming and can take months. Moreover, the process is slowed during the pandemic due to delays in responses from landlords due to remote working, slow mail processing, and landlord hesitancy to make any concessions during the current crisis.

Often, retail debtors with a high number of leases need to seek an extension of the Section 365(d)(4) deadline, which is regularly granted even over objections.¹⁹ Rushing the leases analysis process – whether to structure a prepack before filing or to meet the Section 365(d)(4) deadline during the case – could result in the debtors foregoing significant value from beneficial leases or cause the debtors to incur unnecessary rejection damages or admin. claims. These decisions are even more important as brick and mortar retail becomes less prevalent, and even some loyal consumers fear venturing out of their home just to shop as opposed to the comfort of ordering online. Some retail debtors have assumed all leases when filing a prepack in order to prevent delays.²⁰

ii. Consumer Protection, Unclaimed Property, and Tax Considerations

Regulatory and tax considerations are prominent in retail restructurings. The Texas Attorney General’s Office has appeared in retail bankruptcy cases across the nation on behalf of: (1) the OAG’s Consumer Protection Division, and (2) the Texas Comptroller of Public Accounts. Below is a breakdown of key considerations in retail cases for the Texas OAG’s office.

¹⁹ See generally *In re Tuesday Morning Corp., et al.*, Case No. 20-31476-HDH (Bankr. N.D. Tex. July 9, 2020) (extending the debtors’ section 365(d)(4) deadline).

²⁰ See *In re Belk, Inc.*, *supra* note 12.

1. Consumer Protection Issues

Personally Identifiable Information (“PII”) - Retail cases often involve PII in a number of different forms. Examples include credit card information on customer lists and PII on computer hard drives that a debtor is seeking to abandon as part of a lease rejection motion. The Texas OAG takes the position that, pursuant to 28 U.S.C. § 959(b), debtors must continue to comply with applicable state and federal privacy laws. In practice, this means properly disposing of PII prior to any abandonment. In retail cases, the Texas OAG has generally been successful at negotiating language in rejection orders, sale orders, and confirmation orders making clear that debtors remain obligated to comply with state and federal law dealing with PII.

Gift Cards – The Texas OAG has taken a lead national role related to consumer protection issues associated with gift cards.²¹ There is no governing case law in the Fifth Circuit on whether a gift card claim is a general unsecured claim or a priority claim under section 507(a)(7). However, that has not been an issue of contention in recent retail bankruptcy cases. Rather, the Texas OAG has generally been successful at negotiating language in customer program orders requiring debtors to provide notice of any proposed gift card termination. Such notice includes notice via the retail debtor’s social media platforms.

2. Texas Comptroller of Public Account Issues

Unclaimed Property – Unclaimed property issues are not unique to retail cases. However, just as any other business operating in Texas, retailers must annually report unclaimed property to the Texas Comptroller. Examples of unclaimed property would include a final paycheck not claimed by a former employee who failed to provide a forwarding address. The Texas OAG has

²¹ See, e.g., Jason Binford, Layla Milligan & Abigail Ryan, *Use It Before You Lose It, Chapter 11, Gift Cards and Consumer Protection*, 39-OCT AM. BANKR. INS. J. 14 (2020).

appeared in recent retail cases asserting that, pursuant to state law, unclaimed property is held by a debtor in trust, and therefore is not property of the estate. The Texas OAG typically will negotiate plan language preserving that issue and also (1) acknowledging the debtor's ongoing obligation to report unclaimed property; and (2) to allow access for an unclaimed property audit.

Taxes – The Texas OAG also appears routinely in retail bankruptcy cases in relation to tax matters including the following issues:

Pass-Through Agreements – large retailers often have a long audit history with the Comptroller. Most commonly, an outside tax consulting firm has been working with certain tax type specialists at the Comptroller to resolve audit liabilities in the ordinary course. Fast track cases often present an issue because plans are up for confirmation before the governmental bar date and the Comptroller has not had an opportunity to fully vet the world of potential liabilities. It is also common to have audits and/or refund requests that have been pending for years and involve multiple individuals at the Comptroller and many taxpayer representations. In large retail reorganization cases that do not involve a 363 sale, the Texas OAG, on behalf of the Comptroller, typically proposes a pass-through arrangement in order to allow parties to continue addressing tax matters in the ordinary course, rather than complicating the matter in the administration of the bankruptcy case. Such pass-through arrangement allows the parties, that have a long-standing working relationship, to continue to resolve tax liabilities without getting the Texas OAG or debtor's counsel involved. The Texas OAG has standard language for confirmation orders to this effect.

Trust Fund Taxes – It is especially important to the Comptroller that retailers ensure all ordinary course sale taxes are paid prior to filing and that post-petition sales taxes are timely remitted. In Texas, sales taxes are trust funds and are not property of the bankruptcy estate.

Notably, there may be circumstances in which non-debtor parties – including officers and directors of a debtor – could be held personally and jointly and severally liable for trust fund taxes. Finally, if there is a sweeping arrangement with the lender or any other scenario in which a third party is in receipt of trust fund sales taxes, all parties should be aware that the Texas OAG may pursue those parties that may be in receipt of such trust funds.

Liquidating Case Issues – Liquidating retail bankruptcy cases present a number of tax-related issues. To avoid issues associated with lost records or employees leaving with valuable historical knowledge, the Texas OAG’s typical recommendation to debtor’s or trustee’s counsel is to hire tax consultants to ensure tax audit issues are properly addressed. The Comptroller is permitted to estimate liabilities where taxpayers fail to produce documentation or participate in an audit. As such, it is important that appropriate measures are taken to protect the estate’s ability to meaningfully participate and respond to requests for documentation. In addition, it is often difficult to determine whether liquidating plans are reserving sufficient funds to cover priority tax claims. The Texas OAG routinely works with debtors and trustees to ensure a sufficient reserve and to avoid any violations of the absolute priority rule.

E. Tips for a Successful Retail Prepack

As noted in the above analysis, the keys to a successful prepack are preparation and negotiation. A prepack involves an immense amount of frontloading, so prioritization and organization are critical. The overarching goal is for the debtors’ professionals to secure support for the prepack prior to filing. It is ideal to secure overwhelming (if possible, unanimous) support for the plan from all impaired classes entitled to vote. As noted above, even if obtaining full pre-petition support is not possible, pre-negotiations still aid in reducing the amount of time from petition date to confirmation date. Once the case is filed, debtors and their professionals must work

to obtain an expedited schedule from the court and notify all parties in interest of the hearing date(s). Moreover, when attempting to achieve a quick exit, the debtors and their professionals should be prepared to address the court's due process concerns and should be prepared to build in time to resolve issues with the proposed confirmation order.

Specific to retail debtors, the debtors and their professionals should proactively conduct the Section 365(d)(4) analysis and file assumption and rejection motions on the first day. Additionally, clear and concise communication with the debtors' trade creditors will aid in preventing delays to the debtor's inventory. With respect to Texas regulatory and tax issues, communication is key. The Texas OAG deals with these issues very frequently and is ready, willing, and able to substantively discuss and negotiate solutions. The Texas OAG will file and prosecute objections related to the aforementioned issues if that proves necessary. But, it is very often the case that the parties are able to reach agreement without formal objections. Do not hesitate to reach out to the Texas OAG to discuss (including pre-filing). Such communication is likely to save the estate time and money.