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CLIENT ALERT

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Sellers and Consignors Beware? The Rights of Sellers and Consignors of Apparel and Other Goods in Bankruptcy: Some Questions and Issues to Consider in Light of Barney's Potential Bankruptcy Filing.

Numerous published reports indicate that Barney's (which previously filed for bankruptcy in 1996) has retained bankruptcy counsel and financial advisors in preparation for a potential bankruptcy filing which, according to some reports, may take place as early as July 2019.

Bearing this in mind, clients of the firm with commercial exposure to Barney's—whether as sellers of goods on credit; as consignors of goods pursuant to consignment agreements; or other vendor-vendee relationships—will want to review the terms of their contractual documentation, purchase orders, and payment history very carefully, with the assistance of counsel. Among the issues and questions to be addressed in these pre-bankruptcy situations are the following:

- Have I properly evidenced the terms of my sales, or consignments, of goods to Barney's pursuant to purchase orders, consignment agreements, and other documentation?
- Do I have a UCC-1 financing statement on file, what goods does it cover, and does it fully protect me?
- What does my consignment agreement say regarding my right to receive a return of the consigned goods upon demand? What does my consignment agreement say as to whether Barney's can unilaterally set the price as to which it sells my goods, including in a potential liquidation sale scenario in bankruptcy?
- What does my consignment agreement require or contemplate in terms of documentation as to which goods in Barney's possession are my consigned goods, vs. goods that have been purchased by Barney's as to which Barney's has legal title? It is of critical importance that the consignor be able to clearly identify its goods and differentiate those consigned goods from other inventory that belongs to Barney's.
- What do I do if Barney's is not paying me on account on a current basis, consistent with the terms of the applicable purchase order, consignment agreement, or course of dealing between the parties? Do I continue to ship additional goods and incur additional credit

exposure? Do I consider putting Barney's on COD for new deliveries in order to limit my commercial exposure?

- Are goods-in-transit properly documented, including as to who (as between the vendor and Barney's) has legal title to the goods while they are in transit?
- What do I do if Barney's files for bankruptcy, and I want to get my consigned goods back? How do I ensure that, if Barney's files for bankruptcy and thereafter sells my goods during the bankruptcy process, I promptly receive payment of the net sales proceeds to which I am legally entitled under my consignment agreement?
- How do I ensure that, if Barney's sells goods post-bankruptcy that I sold to Barney's on credit pre-bankruptcy, I receive payment for those goods in the ordinary course of business? I do not want Barney's to sell goods that I delivered to it pre-bankruptcy, only to see Barney's turn those goods into cash post-bankruptcy, keep the money for itself, and then simply treat me as an unsecured creditor in the bankruptcy case. Is that a likely result in bankruptcy and, if so, how can I protect myself against being in that position? Is there anything that I can do now, or in the immediate aftermath of a bankruptcy filing, to avoid that result?
- How do reclamation rights work in bankruptcy, and what are the legal requirements in order to reclaim goods that I have sold on credit, or alternatively to receive priority treatment for goods that I recently shipped to Barney's?
- What is the impact of the automatic stay in bankruptcy on my rights vis-à-vis Barney's? What can I do, and what can't I do, once Barney's has filed for bankruptcy? Can I ask for my consigned goods back post-bankruptcy, and what do I do if Barney's says "no"?
- If I ship goods to Barney's post-bankruptcy (i.e., if Barney's requests that I incur additional credit exposure post-bankruptcy, and I agree to do so), what are my rights and what are my potential risks in agreeing to extend credit to a chapter 11 debtor? Do I have greater rights regarding post-bankruptcy shipments than I do vis-à-vis pre-bankruptcy shipments, and, if so, do I still have risk and what is the nature of that risk?
- What other questions should I be asking, and what other steps can I take both pre- and post-bankruptcy in order to minimize my exposure?

There is unlikely to be a one-size-fits-all answer to these questions, and each client's situation must be analyzed carefully in light of the client's applicable agreements, documentation, and the nature of its business relationship with Barney's. We are available to discuss your specific situation with you and to address whatever questions or concerns you may have regarding your potential exposure to Barney's.

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Please also bear in mind that these issues and questions apply generally to vendors and retailers where their purchaser or consignee becomes financially troubled. We encourage you to contact us whenever you have a counterparty that is financially distressed. In many instances, information about a company's financial condition will not become the subject of news articles speculating about a potential bankruptcy filing. We can also assist you in evaluating your documentation and legal protections in the event of a future bankruptcy filing of your counterparty.



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