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BEYOND BARNEYS: A CRISIS FOR FASHION RETAIL WITH THE ADVENT OF THE CORONAVIRUS PANDEMIC

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Retail fashion has been undergoing substantive transformations in recent times. These challenges to the industry resulted in a wave of bankruptcy filings in 2019. By filing for Chapter 11, distressed companies are able to negotiate with creditors, restructure their business models, and capitalize on their trademarks through auctions, as exemplified by the sale of Barneys. However, the coronavirus pandemic has added an unprecedented weight, further jeopardizing the financial health of many retailers. As consumer demand remains depressed, the typical advantages of Chapter 11 may not prove to be adequate survival mechanisms for many vulnerable fashion companies.

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INTRODUCTION

Retail constitutes the largest private-sector employer in the United States, contributing almost $4 trillion to the annual gross domestic product and accounting for approximately 25% of the total jobs in the country.[1] As such, it is a major player in the overall health of the U.S. economy. Retail is an umbrella term, encompassing such diverse consumer items as household appliances and furnishings; technology goods; and clothing, accessories, and beauty products.

A striking number of retailers filed for bankruptcy in 2019, including Forever 21, Payless Shoes, Z Gallerie, Diesel, and Barneys.[2] Similarly to what often occurs, Z Gallerie obtained debtor-in-possession (DIP) financing and successfully restructured over the period of almost a year.[3] Forever 21 was bought by Authentic Brands Group, Simon Property Group, and Brookfield Property Partners.[4] Real estate investment

1. Vanessa Friedman & Sapna Maheshwari, *'Our Industry Will Fail': Retail Leaders Ask for Emergency Aid*, N.Y. TIMES (Mar. 23, 2020), https://www.nytimes.com/2020/03/23/style/coronavirus-retail-bailout.html.

2. Lauren Thomas, *The Bankruptcies That Rocked the Retail Industry in 2019*, CNBC (Dec. 29, 2019, 10:59 AM), https://www.cnbc.com/2019/12/27/forever-21-among-bankruptcies-that-rocked-the-retail-industry-in-2019.html.

3. *See generally Z Gallerie to Implement Financial Restructuring Through Voluntary Chapter 11 Filing*, BUS. WIRE (Mar. 11, 2019), https://www.businesswire.com/news/home/20190311005380/en/Z-Gallerie-to-Implement-Financial-Restructuring-Through-Voluntary-Chapter-11-Filing; Clint Engel, *DirectBuy Acquires Z Gallerie*, HFN (July 1, 2019), https://www.hfndigital.com/specialty-stores/directbuy-acquires-z-gallerie/.

4. Aishwarya Venugopal, *Forever 21 Snapped Up by Mall Owners, Authentic Brands*, REUTERS (Feb. 19, 2020, 3:06 PM), https://www.reuters.com/article/

trusts such as Simon Property Group often rescue failing brands in bankruptcy.[5]

Among the several highly publicized retail bankruptcies in 2019, Barneys' sale in the closing months of that year created many shockwaves. It had enjoyed a well-established status as one of the biggest brands in the retail fashion sector, a 400 billion-dollar industry according to fashion designer and director Tom Ford, chairman of the Council of Fashion Designers of America.[6] Barneys had long been hailed as an avant-garde, high-fashion oasis for the wealthy, and has been popularized through the media, including appearances on television shows like *Sex and the City*.[7] Its identity and status were inextricably bound to New York City itself.

Approximately one year has elapsed since Barneys' bankruptcy petition filing in the United States Bankruptcy Court in the Southern District of New York.[8] If the demise of Barneys was emblematic of sweeping change in fashion retail, as reflected in its bankruptcy filing that was resolved on November 1, 2019, the effects of the coronavirus pandemic on the industry have certainly caused unprecedented disruption throughout 2020. Clothing stores that were ordered to close due to the concern for public health and safety are particularly vulnerable to fail.

At varying starting points during the month of March 2020 and fine-tuned on a state-by-state basis, only industries deemed essential, including food, medicine, banks, home cleaning and repair items, gas stations, and auto service shops, were permitted to remain open to American consumers dur-

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us-forever21-bankruptcy/forever-21-snapped-up-by-mall-owners-authentic-brands-idUSKBN20D2MH.

5. Matthew Frankel, *Is the Worst Over for Simon Property Group?*, MOTLEY FOOL (Sept. 22, 2020), https://www.fool.com/investing/2020/09/22/is-the-worst-over-for-simon-property-group/.

6. Evan Clark, *Where Fashion Stands in the COVID-19 Crisis*, WWD (Mar. 30, 2020), https://wwd.com/business-news/business-features/fashion-retail-covid-19-coronavirus-bankrtupcies-pandemic-giorgio-armani-saks1203549193-1203549193/.

7. Amy Plitt & Ameena Walker, *20 Iconic 'Sex and the City' Locations in NYC*, CURBED N.Y. (June 12, 2018), https://ny.curbed.com/maps/sex-and-the-city-new-york-filming-locations.

8. Voluntary Petition for Non-Individuals Filing for Bankr. at 1, *In re* Barneys New York, Inc., No. 19-36300 (Bankr. S.D.N.Y. filed Aug. 6, 2019).

ing the early months of the pandemic.[9] Amidst considerable controversy, some states declared essential services to even include liquor stores and shops selling marijuana.[10] But throughout the United States, whereas certain retail establishments like Target and Walmart remained operational and profitable as they offer food and pharmaceutical products in addition to an array of other items, businesses selling exclusively discretionary merchandise such as clothing were shuttered.[11] Federal guidelines ordering such closures, originally set to expire within weeks, crept into months.[12]

While revenues from such non-essential stores ceased during closures, many retail employees who could not come to work continued to be paid for varying amounts of time by their employers—from a range of small to large-scale concerns. Retail businesses temporarily shut down risked an inability to pay rent on their brick and mortar establishments, highlighting the urgency of an online presence during this precarious juncture. A variety of actions across companies ensued in an attempt to lessen fallout from the impact of coronavirus: furloughing employees and reducing executive compensation;[13] drawing down credit lines;[14] negotiating longer timelines for vendor payment;[15] ceasing investor pay-

9. Scottie Andrew, *What Constitutes 'Essential Businesses'? States Seem to Have Varying Standards*, CNN (Mar. 26, 2020, 12:50 AM), https://www.cnn.com/2020/03/25/business/essential-businesses-states-coronavirus-trnd/index.html.

10. *Id.*

11. Irene Jiang, *Here's the Difference Between an 'Essential' Businesses and a 'Nonessential' Business as More Than 30 States Have Imposed Restrictions*, BUS. INSIDER (Mar. 31, 2020), https://www.businessinsider.com/what-is-a-nonessential-business-essential-business-coronavirus-2020-3.

12. Paul LeBlanc, et. al., *Trump Extends Federal Social Distancing Guidelines to April 30*, CNN (Mar. 29, 2020, 10:21 PM), https://www.cnn.com/2020/03/29/politics/trump-coronavirus-press-conference/index.html.

13. Retail Dive Staff, *Tracking Retail's Response to the Coronavirus*, RETAIL DIVE (Jul. 23, 2020) https://www.retaildive.com/news/tracking-retails-response-to-the-coronavirus/574216/.

14. Ben Unglesbee, *Retailers Survived the COVID-19 Closures on Borrowed Money. Can They Pay It Back?*, RETAIL DIVE (June 22, 2020), https://www.retaildive.com/news/retailers-survived-the-covid-19-closures-on-borrowed-money-can-they-pay-it/580044/.

15. Ben Unglesbee, *From Shipments to Cash Flow, Pandemic Uncertainty Makes Reopening Harder*, RETAIL DIVE (June 3, 2020), https://www.retail

outs;[16] skipping rent payments;[17] and offering unprecedented discounts to consumers on new shipments of clothing.[18]

During more stable economic periods, Chapter 11 bankruptcy is usually essential for a distressed business to enjoy an automatic stay, obtain DIP financing, reorganize debt, and emerge as a rebranded, streamlined entity. The unprecedented arrival of the coronavirus pandemic, however, will likely push many more companies within the already radically transforming fashion industry over the brink into bankruptcy, and possibly directly into Chapter 7 liquidation. Classical bankruptcy measures, constructed over individualized timelines, may not be sufficient for many fashion retailers to endure; governmental provisions should be added under these circumstances of force majeure to protect the industry and its many creditors.

In this note examining the retail fashion industry, I will first outline the general philosophy of Chapter 11 bankruptcy and the advantages it affords distressed companies. Next, I will examine the 2019 Barneys bankruptcy as a case study representative of the recent retail fashion market and evolving consumer demands. I will then profile the economic climate in the United States tied to the coronavirus pandemic—with specific emphasis on the direct impact of this health crisis on retail fashion—and will contextualize a few recent bankruptcy filings. Finally, I will profile the fashion industry's plea for federal aid amidst this unprecedented economic setback.

I. CHAPTER 11 REORGANIZATION IN BANKRUPTCY COURT

The bankruptcy process is crucial in allowing retail companies to adjust and correct for issues brought about by circumstances such as unforeseen evolutions in a particular industry and errors in management. As the economy, technology, and consumer demand evolve, the bankruptcy code acts

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dive.com/news/from-shipments-to-cash-flow-pandemic-uncertainty-makes-reopening-harder/578985/.

16. *Id.*

17. *Id.*

18. Lauren Thomas, *Retailers are Dangling Deals Online amid Coronavirus, but Shoppers May Not Show up*, CNBC (Mar. 23, 2020, 3:16 PM), https://www.cnbc.com/2020/03/23/retailers-with-shuttered-stores-push-online-deals-to-try-to-get-sales.html.

as an indispensable safety net for businesses, allowing them to obtain DIP financing and work to restructure their debts.[19] Chapter 11 allows debtors, including fashion companies like Barneys, to continue their normal business operations while developing a reorganization plan, allowing time to negotiate with creditors.[20]

While Chapter 7 is aimed at a quick and full liquidation of a company,[21] Chapter 11 emphasizes the importance of the bargaining process between the debtor and creditors.[22] Specifically, under Chapter 11, the reorganizing debtor has the exclusive right—ordinarily, for up to 180 days after it files its petition—to propose a reorganization plan.[23] This exclusivity period may even be extended upon a showing of good cause.[24] The filing of the petition also triggers the automatic stay, which keeps creditors at bay.[25] After deep structural renovations, the debtor often emerges as a brand-new entity with a different ownership structure and new management.

Chapter 11 also offers a debtor-in-possession another option: a sale under Section 363 of the United States Bankruptcy Code (a "Section 363 Sale").[26] Debtors have been successful in restructuring via the bankruptcy sale, which has evolved into a plan equivalent.[27] Generally, a Section 363 Sale is initiated by an offer from a prospective purchaser, the "stalking horse" bidder, to the debtor.[28] The offer, if acceptable to the debtor, is translated into an asset purchase agreement, which is then presented to the bankruptcy court for approval.[29] The bankruptcy court will approve or deny the sale of the debtor's assets

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19. Elizabeth Warren & Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603, 604 (2009).
20. *Id.*
21. *See generally Chapter 7 Bankruptcy Timeline*, United States Bankruptcy Court Central District of California, www3.cacb.uscourts.gov/timeline/.
22. Warren & Westbrook, *supra* note 19, at 639.
23. *Id.*
24. *Id.*
25. *Id.* at 619.
26. Robert G. Sable, Michael J. Roeschenthaler & Daniel F. Blanks, *When the 363 Sale is the Best Route*, 15 NORTON J. BANKR. L. & PRACTICE 121, 121 (2006).
27. *Id.* at 122.
28. *Id.* at 127.
29. *Id.* at 128–29.

and the bid procedures that will govern the rules and process of the auction.[30]

Bid procedures encourage competitive bidding in an effort to maximize the value of the assets.[31] The procedures outline the auction timeline, notice requirements, deadline to submit bids, and provisions surrounding the stalking horse bidder (e.g., minimum bid increments, break-up fees, and expense reimbursement).[32] Generally, after the bankruptcy court approves the procedures and the bidding window closes, if there are no viable bidders other than the original stalking horse, this original bidder is successful, and the auction is cancelled.[33] The final step is for the bankruptcy court to approve the sale of the debtor's assets to the successful bidder.[34]

Section 363 Sales are appealing to and benefit most, if not all of, the interested parties.[35] Debtors successfully reorganize while satisfying their fiduciary duty to maximize the value of the estate's assets.[36] Creditors enjoy the fruits of the sales, which were conducted in line with the procedures approved by the courts.[37] Buyers acquire the assets free and clear of liens and claims.[38]

However, the status of the distressed business largely affects its prospects for a Section 363 Sale.[39] "Dinosaurs"—unmarketable businesses past their lifespan (e.g., cobbling businesses)—are unlikely to successfully reorganize via a Section 363 Sale, unlike a "good business-bad position" debtor.[40] This latter type of business is determined by analyzing the root cause of the debtor's financial difficulties: "Is the debtor's business inefficient? Does the debtor have a valid and feasible business plan? Is it a workable business model that has been negatively affected by external factors (e.g., fuel prices)?"[41] If the

30. *Id.* at 125–26.
31. *Id.*
32. *Id.* at 125–31.
33. *Id.* at 127.
34. *Id.* at 128–29.
35. *Id.* at 122–23.
36. *Id.* at 122.
37. *Id.* at 125–26.
38. *Id.* at 123.
39. *Id.* at 122–23.
40. *Id.* at 125.
41. *Id.*

business meets these criteria, it likely is a good candidate for reorganization and, possibly, a Section 363 Sale.

Thus, a successful bankruptcy action generates a court-approved safe haven for reorganization within a given time frame. The viability of the company in question at the time of filing is highly determinative of its survival. The following notorious case study demonstrates the trajectory of a legendary company perpetually on the brink of bankruptcy.

II.
Case Study: Barneys' Demise is Symptomatic of the Challenges Confronting the Fashion Industry

A. *History of Barneys*

Ironic given its eventual iconic luxury status, Barneys was established in 1923 as a men's discount clothier by Barney Pressman, whose nickname was the "Cut-Rate King."[42] Eventually expanding to womenswear and home goods, Barneys "upscaled itself into a temple of only-in-New York esoterica."[43] For decades following its origins, the Pressmam family held steady ownership of Barneys and the brand rose in reputation.[44]

The fashion mecca's financial troubles, however, span several of the most recent decades during which it has undergone multiple junctures of reorganization. Barneys first filed for Chapter 11 bankruptcy protection in 1996.[45] Subsequently, the fashion establishment's ownership changed several times.[46] In 2012, Barneys' largest bondholder, Perry Capital, swapped its debt for equity, and the company avoided filing for bankruptcy once again.[47] Despite this effort, Barneys was ultimately forced to file Chapter 11 in 2019 due to a variety of issues including mismanagement, skyrocketing real estate leases, and dramatic shifts in consumer demand.[48]

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42. Matthew Schneier, *What Went Wrong at Barneys? How a New York Shopping Paradise Went Big, then Bankrupt*, THE CUT (Oct. 24, 2019), https://www.thecut.com/2019/10/how-barneys-went-bankrupt-and-what-comes-next.html.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*

B. *Reasons for Filing*

Barneys filed a voluntary Chapter 11 bankruptcy petition in the Southern District of New York on August 6, 2019.[49] Multiple factors, many of which were outside its control, forced Barneys to seek bankruptcy protection. Barneys was emblematic of the type of debtor Sable termed "Good Business—Bad Position."[50] Although its Chapter 11 case involves a particular set of circumstances, its financial struggles reflect recent changes in the fashion industry and their corresponding impacts on retailers.

1. *Lease Payments*

One of the most publicized and immediate factors adding to Barneys' financial distress was rising rental costs: its Madison Avenue flagship store's monthly rent payments rose to $30 million in 2019.[51] The bankruptcy process allowed Barneys to close 15 of its 22 physical stores including discount outlets across the United States.[52] These sweeping closures were crucial in receiving financing needed to keep remaining stores open while it sought a buyer for the company.[53]

The skyrocketing expense of premiere physical showcases is one of the most important transformations in the retail fashion industry. The flagship store concept is shifting in importance and is thus disappearing from many high-profile business plans.[54] Numerous retail names are closing flagship stores globally including Gap and Polo Ralph Lauren on New York's Fifth Avenue and Abercrombie & Fitch in Milan, Hong Kong, and Copenhagen.[55] However, Barneys continued to place an overwhelming focus on expensive-to-run spaces, even opening a new Seventh Avenue store immediately next door to the original Barneys flagship location.[56]

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49. Voluntary Petition for Non-Individuals Filing for Bankr. at 1-2, *In re* Barneys New York, Inc., No. 19-36300 (Bankr. S.D.N.Y. filed Aug. 6, 2019).
50. Sable, Roeschenthaler & Blanks, *supra* note 26, at 125.
51. Schneier, *supra* note 42.
52. *Id.*
53. *Id.*
54. *The Retail Apocalypse is Shutting Down Flagship Stores*, USA Today (Aug. 1, 2019), https://www.usatoday.com/story/money/2019/08/01/retail-flagship-stores-close-rent-online-shopping-skyrockets/1888004001/.
55. *Id.*
56. Schneier, *supra* note 42.

Retail sales plummeted more than 8% during the second quarter of this year, the largest drop since 2009's financial crisis,[57] and have continued to lag. With these external changes, retailers have been forced to restructure their business models and concepts. Mega fashion houses and retailers are emphasizing online services in reaction to fewer customers visiting their physical stores, or are returning to smaller, intimate brick and mortar concepts which appear to be more appealing to today's consumer.[58] Additionally, unlike Barneys, stores such as Saks Fifth Avenue, which own the real estate constituting their renowned flagship properties, are better cushioned from financial distress.[59]

2. *E-Commerce*

Another leading cause of Barneys' financial distress was a strong shift in consumer preferences towards online shopping.[60] Barneys, like many other retailers, was slow to adapt to the mounting e-commerce trend.[61] The ascendancy of the behemoth Amazon.com, Inc. has modeled online and delivery capabilities that consumers now demand. Shoppers are also expecting ever-improving customer service, such as curbside pick-up options provided by Walmart Inc. and Target Corporation.[62]

Barneys was once hailed as the apex supplier of cutting edge, high-end clothing; however, its failure to embrace e-commerce meant that it could not compete with online-based upmarket fashion suppliers such as Net-a-Porter. Similarly,

57. *U.S. Retail Figures Q2 2020*, CBRE, https://www.cbre.us/research-and-reports/US-Retail-Figures-Q2-2020.

58. Phil Wahba, *The Retailers that Are Smartest About Shopping Tech Will Finish on Top After the Coronavirus*, FORTUNE (Apr. 20, 2020, 5:30 AM), https://fortune.com/2020/04/20/coronavirus-retail-industry-ecommerce-online-shopping-brick-and-mortar-covid-19/.

59. Gina Chon, *Saks is Improving as a Retailer, but Real Estate is Its Crown Jewel*, QUARTZ (May 22, 2013), https://qz.com/87317/saks-holds-on-as-a-retailer-but-its-real-estate-looks-shiny/.

60. Schneier, *supra* note 42.

61. Schneier, *supra* note 42.

62. Micheline Maynard, *Consumers Overwhelmingly Like Curbside Pickup, and More from a New COVID-19 Survey*, FORBES (June 18, 2020, 1:53 PM), https://www.forbes.com/sites/michelinemaynard/2020/06/18/consumers-overwhelmingly-like-curbside-pickup-a-new-covid-19-survey-shows/#329843f574fd.

Pier 1, a home goods store, filed for bankruptcy because of changing consumer tastes and an unforgiving retail environment.[63] The company struggled with competition from online platforms, mass merchants, and off-price retailers like Etsy and Wayfair.[64] It was late to embrace e-commerce; however, like Barneys, its Chapter 11 filing provided the struggling retail giant with additional time and financial flexibility as it pursued the sale of the company.[65]

3. *Competition at Varied Price Points*

Barneys could not keep up with competition on multiple fronts: a) discounted fashion retailers, b) second-hand resellers, and c) innovative clothing rental programs. Even beyond similar luxury-targeted retailers drawing customers through online merchandising, other categories of clothing purveyors challenged its former reputation for preeminence.

a. Discount

Lower priced, fast-fashion retailers, like Zara and Uniqlo, are increasingly popular in today's society. "Fast fashion" can be defined as "an approach to the design, creation, and marketing of clothing fashions that emphasizes making fashion trends quickly and cheaply available to consumers."[66] By prioritizing trend replication, speedy production, and lower quality materials, fast fashion normalizes—and renders accessible—the very expensive and exclusive fashion forward lines that were once idolized in Barneys' stores.[67]

b. Resale

Similarly, second-hand marketplaces, like The Real Real and ThredUp, have devoured a large slice of the luxury fashion market that Barneys and other like fashion retailers once

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63. Aisha Al-Muslim, *Pier 1 Imports Files for Chapter 11 Bankruptcy*, WALL ST. J. (Feb. 17, 2020), https://www.wsj.com/articles/pier-1-imports-files-for-chapter-11-bankruptcy-11581959763.

64. *Id.*

65. *Id.*

66. Audrey Stanton, *What is Fast Fashion, Anyway?*, THE GOOD TRADE, https://www.thegoodtrade.com/features/what-is-fast-fashion.

67. *Id.*

cornered.[68] Most recently, the mainstream retailer Nordstrom, founded in 1901, has entered the resale market.[69] Resellers offer products of the same high fashion pedigree to consumers, but at a fraction of their original cost.[70] These second-hand markets cater to today's consumers— specifically those in their 20s and 30s—who want to avoid large investments but still wish to enjoy the highest luxury brands.[71] Moreover, secondhand shopping, which decreases landfill use, water pollution, and greenhouse gas emissions, is an important tool in lessening the fashion industry's giant environmental footprint.[72]

c. Rental

Another consumer trend pressuring fashion retailers such as Barneys to evolve or reorganize is the rise of clothing rental services. Clothing rental services allow consumers to rent clothes for a monthly fee in lieu of purchasing them.[73] Rent the Runway was one of the first online programs of this type.[74] Retail giants including Bloomingdales, Banana Republic, and Urban Outfitters are now trying to replicate its business model.[75] Clothing rental programs are illustrative of the increasingly sharing economy in the United States, where customers are less interested in outright ownership and big investments.[76]

As department stores' earnings are projected to continue to sink and the number of retail bankruptcies continues to grow, clothing rental programs are vital.[77] According to research firm GlobalData, "now a booming $1 billion business, the clothing rental sector is expected to reach $2.5 billion by

68. Anne D'Innocenzio, *Retailers Try Clothing Rental, but Will It Be a Good Fit?*, ABC NEWS (Feb. 10, 2020, 8:54 AM), https://abcnews.go.com/Business/wireStory/retailers-clothing-rental-good-fit-68882968.

69. *Id.*

70. *Id.*

71. *Id.*

72. Allison Hirschlag, *Can Secondhand Shopping Dent Fast Fashion's Environmental Damage?*, SCI. AM. (Nov. 7, 2019), https://www.scientificamerican.com/article/can-secondhand-shopping-dent-fast-fashions-environmental-damage/.

73. D'Innocenzio, *supra* note 68.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

2023."[78] Clothing rental programs lessen the pressures on retailers to have large inventories of unsold goods that would need to eventually be deeply discounted.[79] Moreover, they have a 20–25% profit margin, whereas traditional retailers have a 5% operating profit.[80]

4. *Experiences vs. Materiality*

Lastly, consumers—specifically the younger generations—are increasingly prioritizing experiences over materiality. One study found that 78% of millennials prefer spending money on experiences rather than goods.[81] Some retailers have adapted to this phenomenon. After the Toys "R" Us bankruptcy, for example, conglomerates like Target and Walmart shifted their strategies in the toy industry by rebranding themselves as dynamic shopping experiences—boasting play areas, new toy demonstrations, interactive displays, and kids' events.[82] The hospitality industry is experiencing the same shift in consumer demand and is in the process of reinventing its business model by placing an emphasis on the experience and curation of a lifestyle.[83]

Fashion retailers must similarly captivate their audience in an incrementally competitive marketplace through innovative approaches to their merchandising. Barneys failed to keep up with customers' changing spending habits and their search to be engaged with fresh experiences, but instead, preserved its coastal, sophisticated image as competitors adapted.[84] Steve Sadove, the former CEO and chairman of Saks and now senior

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78. *Id.*

79. *Id.*

80. *Id.*

81. Blake Morgan, *NOwnership, No Problem: Why Millennials Value Experiences over Owning Things*, FORBES (June 1, 2015), https://www.forbes.com/sites/blakemorgan/2015/06/01/nownershipnoproblem-nowners-millennials-value-experiences-over-ownership/#567533645406.

82. Anne D'Innocenzio, *Retailers up Their Game After Toys R Us Closures*, AP NEWS (Oct. 12, 2018), https://apnews.com/d0c339a9b72c4b4291a78e217f8d76e6.

83. Christine Ajudua, *In the Hospitality Game, New Players with Familiar Names*, N.Y. TIMES (Aug. 15, 2018), https://www.nytimes.com/2018/08/15/travel/new-hotel-brands.html.

84. Shaye Weaver, *Barneys Officially has a New Owner: Authentic Brands*, AMNY (Nov. 1, 2019), https://www.amny.com/editorial/bankruptcy-judge-approves-sale-of-barneys-assets/.

adviser for MasterCard, noted the danger of a large business, like Barneys, relying on such a narrow, niche market.[85]

The multiple factors outlined above, illustrating the dramatic evolution facing the fashion retail industry, led Barneys straight into its second, and final, Chapter 11 case. Rising rents are forcing closures of physical stores and increasing the importance of e-commerce. Fashion retailers must confront competition head-on, including fast-fashion brands, resellers, and clothing rental programs. They must also reinvent their strategies to attract younger generations and rebrand themselves as distinctive experiences, rather than as merely lookalike sources of disposable goods.

C. *Purchase & "Survival" of Barneys*

On the same day that it filed its Chapter 11 petition, Barneys secured $218 million in DIP financing, an arrangement crucial for allowing its operations to continue while soliciting bids for the sale of the company.[86] Authentic Brand Group (ABG), the stalking-horse bidder, produced an offer.[87] The Bankruptcy Court approved the corresponding asset purchase agreement and related bid procedures.[88] However, after no viable bidders other than ABG emerged and an additional extension of the bidding deadline was denied, the Bankruptcy Court approved the sale.[89] ABG purchased Barneys, including its intellectual property, for roughly $271 million.[90]

ABG owns a number of brands in fashion retail including Nine West and Juicy Couture.[91] The company is known for purchasing distressed retailers in bankruptcy and licensing their brands to other companies,[92] a strategy that circumvents

85. *Id.*

86. Dhani Mau, *What's Going on with Barneys? A Timeline of its Sale and What's Next*, FASHIONISTA (Nov. 1, 2019), https://fashionista.com/2019/11/barneys-closing-bankruptcy-timeline.

87. *Id.*

88. *Id.*

89. Soma Biswas, *Judge Approves Sale of Barneys to Authentic Brands*, THE WALL ST. J. (Oct. 31, 2019), https://www.wsj.com/articles/bankruptcy-judge-approves-authentic-brands-bid-for-barneys-11572545990.

90. *Id.*

91. Mau, *supra* note 86.

92. Vanessa Friedman & Sapna Maheshwari, *Barneys is Sold for Scrap, Ending an Era*, N.Y. TIMES (Nov. 1, 2019), https://www.nytimes.com/2019/11/01/business/barneys-bankruptcy-authentic-brands.html.

the issues of rent for physical space, staff, and inventory. As Barneys' physical stores were eliminated, one of ABG's top priorities is expanding Barneys' e-commerce presence, including high-fashion collaborations and namesake products.[93] There will also be a focus on experiences like pop-ups and shop-in-shops with an emphasis on "art and cultural installations and exhibits, and entertainment that fosters creativity and community."[94]

Additionally, ABG licensed the Barneys' brand to Saks Fifth Avenue to create Barneys at Saks.[95] The vision, extending to both an in-store and online presence, is to "usher Barneys New York into a new era while staying true to the brand's DNA."[96] This is a perfect case study of Chapter 11 allowing a retail fashion mega business to molt and evolve into a new interpretation of itself that is relevant for today's luxury consumer. The successful sale is evidence that Barneys was hardly a "dinosaur," but rather, failed to evolve with the market. ABG's acquisition of the intellectual property and subsequent licensing of the brand promises to revitalize Barneys.

III.
Force Majeure: Coronavirus

Barneys' series of strategies to remain afloat spanned several decades, and most recently, the 2019 filing provided months to resolve its fate. Currently, fashion companies are struggling to cope with the identical systemic changes to the retail market that Barneys was actively battling. Never before, though, have they been confronted with the financial pressures created by the government measures aimed at curbing the spread of coronavirus. The pandemic is proving to be yet another weight—a powerful, unanticipated one—being balanced on top of the fragile fashion retail industry. This has created and will continue to generate a wave of retail companies failing to stay afloat and filing for bankruptcy. As Mark Cohen, director of retail studies at Columbia Business School, suggests: "This is going to change the culture of the society that we all live in, buying behaviors are going to fundamentally

93. Mau, *supra* note 86.
94. *Id.*
95. *Id.*
96. *Id.*

change, the enterprise that services the public will be fundamentally changed. How will retail look on the other side of this pandemic?"[97]

A. *Economic Climate*

Over 200,000 businesses were forced to close as of March 30th, 2020.[98] Visits to U.S. retail stores fell 98% in that month compared to the same period in 2019[99] and consumer foot traffic growth was negative for eight consecutive weeks.[100] Although some improvement in retail sales was recorded in the month of June, increased coronavirus cases in many parts of the country negatively impacted sales in the second quarter. As stay-at-home orders expired and consumers ventured out, the economy and retail industry did not immediately jolt back to life; it will likely take a considerable period of time before consumers' buying habits return to normal.[101]

Some retailers see income through their online platforms; however, it is not enough for those that are still predominantly brick-and-mortar based. Moreover, as the luxury market is highly correlated to the stock market, consumers' luxury purchases are assuredly going to be put on hold for the foreseeable future.[102] Boston Consulting Group estimated a 29% drop in luxury sales as a result of the virus.[103] Unable to pay their bills, including rent and payments to vendors and service

97. Evan Clark & Sindhu Sundar, *Tipping Point: Bankruptcy Looms Amid COVID-19 Crisis*, WOMEN'S WEAR DAILY (Mar. 19, 2020), https://wwd.com/business-news/financial/tipping-point-bankruptcy-looms-amid-covid-19-crisis-1203542369/.

98. Kim Bhasin & Ed Ludlow, *Racing to Zero: Distancing Crushes Retail, Hotels, Dining*, BLOOMBERG L. (March 31, 2020), https://news.bloomberglaw.com/coronavirus/racing-to-zero-social-distancing-crushes-retail-hotels-dining.

99. *Id.*

100. *Id.*

101. Kerri Panchuk, *Expect Another Wave of Retail Bankruptcies by Year's End*, BISNOW (June 10, 2020), https://www.bisnow.com/dallas-ft-worth/news/retail/market-observers-expect-another-wave-of-retail-bankruptcies-and-hardship-for-at-least-two-years-104764.

102. *See* Richard Collings, *Neiman Marcus Could Be One of the First Retail Casualties of Coronavirus*, ADWEEK (Mar. 25, 2020), https://www.adweek.com/retail/neiman-marcus-could-be-one-of-the-first-retail-casualties-of-coronavirus/.

103. Leticia Miranda, *Fifth Avenue is Going Out of Style for Luxury Retailers, as Coronavirus Erodes Sales*, NBC NEWS (June 22, 2020), https://www.nbc

providers, retailers are increasingly in jeopardy of insolvency.[104] Experts forecast a substantial increase in U.S. retail bankruptcies, specifically Chapter 7 filings, this year.[105]

B. *Coronavirus-Related Bankruptcies*

J.Crew Group Inc., J.C. Penney, Lord & Taylor, Men's Wearhouse, Lucky Brand Jeans, and Neiman Marcus are among major clothing merchandisers with downgraded credit ratings who subsequently filed for bankruptcy.[106] Some financially distressed companies, such as Ascena which operates brands like Ann Taylor, Loft, and Lane Bryant, repurchased some of their own debt to stay afloat but eventually were forced to file.[107] Brooks Brothers reduced corporate salaries and furloughed most of its staff but, likewise, ultimately filed for bankruptcy.[108] Many companies will not be able to weather the financial stress of the pandemic and their resulting bankruptcies may look different than usual.[109] Typical bankruptcy reorganizations relieve distressed retailers by pausing debts and renegotiating or rejecting leases. Such restructuring limits their obligations while giving them time to restructure or conduct a proper sale process to find a going concern buyer.

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news.com/business/business-news/fifth-avenue-going-out-style-luxury-retailers-coronavirus-erodes-sales-n1231810.

104. Clark & Sundar, *supra* note 97.

105. *Id.*

106. Jeremy Bowman, *These 20 Retailers May Go Bankrupt in 2020*, MOTLEY FOOL (Feb. 12, 2020), https://www.fool.com/slideshow/these-20-retailers-may-go-bankrupt-2020/?slide=2; *see The Running List of 2020 Retail Bankruptcies*, RETAIL DIVE (Aug. 17, 2020), https://www.retaildive.com/news/the-running-list-of-2020-retail-bankruptcies/571159/.

107. Ben Unglesbee, *Ascena Gives its Balance Sheet Some Relief, But Analysts Still Expect a Restructuring*, RETAIL DIVE (Mar. 17, 2020), https://www.retaildive.com/news/ascena-gives-its-balance-sheet-some-relief-but-analysts-still-expect-a-res/574274/; David Moin, *Bankruptcy Watch: Retail in a Tailspin*, WWD (Apr. 17, 2020), https://wwd.com/business-news/retail/bankruptcy-watch-retail-in-a-tailspin-1203564009/; Daphne Howland, *Bankrupt Ascena To Close More than 1k Stores*, RETAIL DIVE (July 27, 2020), https://www.retaildive.com/news/bankrupt-ascena-to-close-more-than-1k-stores/582336/.

108. Sapna Maheshwari, *Bankrupt Brooks Brothers Finds a Buyer*, N.Y. TIMES (Aug. 12, 2020), https://www.nytimes.com/2020/08/12/business/brooks-brothers-sale-authentic-brands.html#:~:text=the%20retailer%20is%20seeking%20court,Brands%20Group%2C%20a%20licensing%20firm.

109. *See* Warren & Westbrook, *supra* note 19; Moin, *supra* note 107.

However, as lenders are expected to remain extremely cautious and consumers continue to chill spending during the pandemic, Chapter 7 liquidations may rise for fashion retailers, especially as Chapter 11 cases are lengthier and more expensive.[110] Additionally, to obtain DIP financing during reorganization, a business needs to show a cash flow forecast and a business plan that convinces the lender to support the company.[111] This will prove difficult for many fashion retailers during the current economic downturn, as banks and other lenders will—more strongly than ever before—weigh the risk involved in the ability to recover their investment.

Bldwn, a fashion brand based in Los Angeles, was one of the first clothing retailers to succumb to the pandemic.[112] After a round of massive layoffs, the brand eyed a Chapter 7 liquidation.[113] The company blames the "financial fallout from the coronavirus and all of the state and federal mandates that have essentially halted the fashion and apparel business, as well as the economy at large."[114] True Religion, another California brand, filed for bankruptcy in April, citing the same financial strain from the pandemic.[115]

Neiman Marcus—a pinnacle of luxury retailing whose store Bergdorf Goodman was seen as the heir apparent for Barneys' customers after the latter's demise—was already carrying an unsustainable debt load—around $4.3 billion—as well as negative cash flow.[116] Last year, Neiman Marcus avoided bankruptcy after reaching a deal with creditors to restructure its debt.[117] The debt-laden luxury department store was forced to close all its stores from early March

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110. *See* Warren & Westbrook, *supra* note 19; Clark & Sundar, *supra* note 97.

111. Clark & Sundar, *supra* note 97.

112. Kali Hays, *L.A. Fashion Brand Bldwn Filing for Bankruptcy*, WOMEN'S WEAR DAILY (Mar. 25, 2020), https://wwd.com/business-news/financial/l-a-fashion-brand-bldwn-filing-for-bankruptcy-1203547210/.

113. *Id.*

114. *Id.*

115. *Denim Retailer True Religion Files for Bankruptcy Protection amid Virus crisis*, REUTERS (Apr. 13, 2020, 5:08 PM), https://www.reuters.com/article/us-health-coronavirus-true-religion/denim-retailer-true-religion-files-for-bankruptcy-protection-amid-virus-crisis-idUSKCN21V222.

116. *See* Collings, *supra* note 102.

117. *See id.*

through at least part of June due to coronavirus.[118] This shutdown could not have come at a worse time for the luxury retail giant as the United States entered its peak retail season and event cancellations, like weddings and graduations, cut deeply into sales.[119] Significant upcoming interest payments on its debt, relentless competition from e-commerce platforms, and the pandemic's economic toll forced Neiman Marcus to join the wave of retail bankruptcies.[120]

C. *Retailers' Plea for Government Aid*

The United States government has passed various stimulus packages to address the nationwide economic downturn due to the coronavirus. Federal aid has provided bailouts to major distressed industries such as airlines, institutions of higher education, and hospitals. On the other end of the continuum, it has awarded loans and grants designed for small businesses. However, no specific attention to-date has been directed to the fashion retail segment, although approximately sixty companies-including, Yeezy, Moda Operandi, The Row, Rag & Bone, and Alice & Olivia each benefitted from funds intended to keep small-scale companies afloat.[121]

Given the scope of retail fashion—a $400 billion business employing millions—such governmental action is crucial.[122] Matthew Shay, the National Retail Federation's CEO, called upon President Trump and congressional leaders to provide a lifeline to the overall retail industry, the nation's largest private-sector employer, in the form of government-backed loans and tax relief.[123] Shay advanced that cumulative losses to retail amount to tens of billions of dollars a week during the pan-

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118. *Id.*

119. *See id.*

120. *See* Jessica DiNapoli & Mike Spector, *Exclusive: Neiman Marcus Advances Bankruptcy Preparations*, REUTERS (Apr. 2, 2020, 10:09 PM), https://www.reuters.com/article/us-neimanmarcus-bankrupty-exclusive/exclusive-neiman-marcus-advances-bankruptcy-preparations-sources-idUSKBN21L071; *See also* Ben Unglesbee, *Neiman Marcus says it's on Track to exit Bankruptcy by Fall*, RETAIL DIVE (June 18, 2020), https://www.retaildive.com/news/neiman-marcus-says-its-on-track-to-exit-bankruptcy-by-fall/580077/.

121. Kali Hays, *All the Fashion Companies that got PPP Loans*, WOMEN'S WEAR DAILY (July 7, 2020), https://wwd.com/business-news/financial/fashion-beauty-companies-that-got-ppp-coronavirus-loans-list-1203668972/.

122. Clark, *supra* note 6.

123. Clark & Sundar, *supra* note 97.

demic.[124] With continuing expenses and no sales, access to credit is necessary to sustain businesses until consumers return to the marketplace.[125] Shay also suggested that mandatory default and foreclosure stays and rent abatements would provide relief for shuttered retailers.[126] As layoffs persist, federal aid remains necessary to prevent the demise of the retail industry, a major player in employment.[127]

CONCLUSION

The coronavirus pandemic has impacted a broad swath of the fashion community—covering small to large entities, from fast-fashion mills to luxury merchandising and independent designers to heritage brands, across a wide range of financial positioning and degrees of modernization. Bankruptcy proceedings are designed to provide companies with a measure of protection, allowing court-approved adjustments within a limited time period. But coronavirus has brought about, for many in the fashion industry, sudden cessation of business operations—radically accentuating any preexisting weaknesses more easily absorbed during a strong economy. Time is running against all efforts to survive, with financial difficulties particularly pressing for small and medium business owners. A growing divide between winners and losers that was already shaping retail will dramatically ramp up through the disruption caused by coronavirus.

Governmental relief measures to date—other than for airline companies, higher education, and hospitals, for example—have not been earmarked for precise business categories. Some of the hardest hit since the onset of the pandemic are hotels, restaurants, and retail companies. Perhaps financial aid should be accorded specific industries in quantifiable amounts, rather than providing funds on a first-come, first-served system, often favoring companies with which banks already conduct business and veering monies away from the intended recipients of the relief incentives.

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124. *Id.*
125. *Id.*
126. *Id.*
127. Sarah Chaney, *U.S. Unemployment Claims Remain Elevated Above 800,000*, WALL ST. J. (Oct. 8, 2020), https://www.wsj.com/articles/weekly-jobless-claims-coronavirus-10-08-2020-11602098873.

The month of March 2020 brought about the sharpest drop in consumer confidence since the Great Recession of 2008; severe unemployment; and the highest one-month drop in U.S. retail sales in almost 30 years, with clothing and accessories, specifically, at 50.5% less than average.[128] The International Monetary Fund has predicted the worst worldwide economic downturn since the Great Depression. No simple solutions can remedy the sudden losses occurring during the governmental shutdown of retail fashion. The lessons already apparent in the industry around the era of Barneys' bankruptcy—such as the need for distributions across varied platforms; decreasing emphasis on flagships; and financial flexibility—have no time to be gradually integrated. Although currently classified as *non-essential*, retail clothing fulfills both a functional need and creative outlet for American consumers and is an exceedingly *essential* part of our economic vitality. Governmental support in turbulent months ahead may prove the only method of preventing a continuing free fall of the industry.

128. Sapna Maheshwari & Ben Casselman, *'Pretty Catastrophic' Month for Retailers, and Now a Race to Survive*, N.Y. TIMES (Apr. 15, 2020), https://nyti.ms/2Xy4Fia.