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**THE FINANCIALLY DISTRESSED FRANCHISEE
ADVANCED STRATEGIES FOR FRANCHISORS AND
FRANCHISEES**

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I. Introduction

Hello. My name is Dan Eliades. I am with the law firm of Forman Holt Eliades & Ravin.

We are a bk boutique with offices in New Jersey, New York City and Philadelphia.

Before getting to the topic, I'd like to provide some personal background so you know my perspective on the Financially Distressed Franchisee.

I have practiced bk law exclusively for 17 years. During that time, I have represented debtors, creditor committees, bk trustees and stand alone creditors in bk cases.

While I have represented franchisees as debtors in bk cases, for the past 6-7 years I have primarily represented franchisors in work outs with troubled franchises and in bk cases of franchisees.

In that capacity, we have represented franchisors in about 1,000 bk cases filed by franchisees or guarantors.

Those matters have ranged from:

- relatively straightforward scenario of a chapter 7 filing by previously terminated franchisees whose locations were already de-identified
- to complex chapter 11 cases of existing, multi unit, publicly traded, franchisees.

II. Topic

Later in the program I will talk about franchisee bk cases.

Before getting to that I'd like to address pre-filing work out opportunities.

Before many bk filings by franchisees, there is a window of opportunity for the franchisor and franchisee to discuss a work out.

These circumstances provide both parties an opportunity to improve their positions.

These situations also lend themselves to creative lawyering and creative business solutions.

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III. Benefits for Franchisor.

Forbearance Agreements provide many benefits to the franchisor.

First, forbearance agreements are an alternative to termination and serve to keep units in the franchise system. This is perhaps the most important benefit of the forbearance agreement to the franchisor.

Secondly, the franchisor can gain valuable rights and additional security via the forbearance agreement which come in handy in the event of further deterioration of the franchisee. We'll talk about these additional rights and interests in a minute when we get into the nuts and bolts of agreements.

Next, forbearance agreements can significantly enhance the franchisors' ability to recover money in the event of further financial problems of franchisee.

Also, in the event of a further collapse, a well drafted forbearance agreement can hasten the franchisors' termination rights and make de-identification faster and cheaper.

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IV. Benefits for Franchisees

The flip side of the coin is the benefit to a franchisee.

To start with, a forbearance agreement allows the franchisee to live another day in that it avoids termination of the franchise agreement which is almost always critical to survival of the franchisee as a going concern.

These agreements, by their nature, provide for forbearance and in some instances waiver by the franchisor of some of its remedies.

They give franchisees an opportunity to restructure basic terms of the franchise agreement. This benefit is a double edged sword, however, as franchisors often also want to modify initial the deal.

Forbearance agreements give the franchisee an opportunity to cure defaults under the franchise agreement over a prolonged period of time -- longer than in the franchise agreement.

These agreements can enable the franchisee to avoid bk and the consequences of bk.

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V. Nuts and Bolts

Writing. It almost goes without saying that for clarity and for enforcement reasons, forbearance agreements should be in writing.

Title. The next issue is what to call these agreements. There are many different names. Some call them work out agreements, modification agreements, restructurings and other titles.

Franchisors or lenders like to title these agreements forbearance agreements. That way is right in the title of the agreement that the franchisor is forbearing from exercising some right and is therefore giving something up in exchange for any benefits it receives by entering this agreement.

This consideration becomes a big deal when considering potential preference and fraudulent conveyance exposure which we'll address later.

SLIDE CHANGE

Common provisions and issues in forbearance agreements are set forth in the materials. I'd like to highlight some of the key provisions.

1. **Reaffirmation of Agreement and Acknowledgement of Obligations.**

Forbearance agreements generally begin with recitals of all of the underlying agreements between the parties.

This is followed by reaffirmation of the franchise agreement and any related agreements by the franchisee and guarantor if there is one.

Then there is a section where the franchisee and guarantor acknowledge their existing and going forward liabilities to the franchisor.

A form of an operative section acknowledging and reaffirming obligations is contained in the materials.

2. **Acknowledgement of Defaults by the Franchisee.**

A basic provision is an acknowledgement by the franchisee and any guarantor of all monetary **and** non-monetary defaults.

The franchisee and guarantor are also usually called upon to acknowledge the lack of any defense or setoff to the existing defaults and further acknowledge the lack of any claims of any nature by the franchisee or guarantor against the franchisor.

3. Acknowledgement of Franchisor's Remedies.

In addition to the acknowledgment of default and lack of defenses, franchisors need additional acknowledgements. Specifically the franchisor will demand admission -

(a) by the franchisee that it has received proper notice of the existing defaults from the franchisor;

(b) that the franchisee has not cured any of the existing defaults within the time provided under the franchise agreement, if any; and

(c) that the franchisor is rightfully entitled to terminate the franchise agreement.

After this acknowledgement I suggest that franchisors then include a non-exhaustive list of the remedies which the franchisor is entitled to exercise (i.e. termination, collection action, repossession of any collateral granted to the franchisor under the franchise agreement and compelled de-identification).

It is this bundle of rights that the franchisor is going to forebear from exercising that serve as the primary consideration being given by the franchisor for whatever it is getting under the agreement.

4. Agreed Repayment Terms.

With respect to monetary defaults, the forbearance agreement will generally include a compromise by the franchisor of the time within which the indebtedness may be paid.

Some agreements also provide for a forgiveness or waiver of a portion of the arrears.

The waiver of a portion of the existing indebtedness is usually tied to certain performance benchmarks such as the franchisee remaining in good standing for a certain period.

Curious to know how many franchisors have a policy of never offering a conditional waiver of arrears?

Waive interest or late fees? Other soft fees?

5. Agreed Terms of Cure of Non-Monetary Defaults.

The forbearance agreement should include the terms of cure of any non-monetary defaults. Punch list/quality/insurance/technical.

If these non-monetary defaults are going to be cured state how and when. If they are being waived then spell that out as that's additional consideration being given by franchisor.

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6. Security for Performance and Repayment.

One of the most critical concessions that franchisors can obtain from franchisees as part of forbearance agreements is new or enhanced security for payment and performance.

Some of the common forms of security obtained by the franchisors include:

a. Security Interest in Personal Property.

A security interest in collateral.

Such collateral may include: accounts receivable, inventory, deposit accounts, ff&e, life insurance policies and many other forms of personalty.

It is important for franchisors to appropriately record UCC-1's and perfect its interest in the collateral. Otherwise, if the franchisee later files for bk, the trustee can trump the franchisor in priority because the franchisor is an unperfected secured creditor.

b. Mortgage.

The franchisor may be able to negotiate the conveyance of a mortgage on real property owned by the franchisee or a guarantor.

It should be noted that some franchisors are reluctant to take collateral mortgages under any circumstances for fear of down the road liability as a lender in possession.

c. Confessions of Judgment.

The franchisee and guarantor may also be asked to execute confessed judgments establishing their future liability to franchisor.

It is important to work with local counsel when utilizing confessions of judgment as the availability and implementation of these judgments vary widely among jurisdictions.

The confessed judgments are commonly held by franchisor in escrow and are not filed nor executed upon unless an uncured event of default has occurred under the agreement.

If the franchisee or guarantor satisfies all of their obligations under the forbearance agreement when they are due, the original confessed judgments are returned.

d. Additional Guarantors.

Obtaining additional guarantors for the franchisees' obligations is another frequent demand of franchisors.

Potential targets are any principal of franchisee who is not already a guarantor; spouses; highly paid officers.

e. Acknowledgement of Non-Discharge.

While not providing additional security per se, in cases of individual franchisees or guarantors, aggressive franchisors explore any basis for an acknowledgement by the individuals that the nature of their debt to the franchisor would be non dischargeable in any subsequent bk filing.

Examples of this situation may involve (1) the submission of fraudulent/false financial statements by the individual guarantor or franchisee to the franchisor or (2) the improper disposition of franchisor collateral by the individual.

If this is the case, franchisors may ask for acknowledgements by the individuals that their debt is a type that would not be discharged in a subsequent bk case.

This provision may not be dispositive in a later filed adversary proceeding but will be an admission and a strong indication of non-dischargeable liability.

6. Forbearance from Exercise of Franchisor Remedies.

1. As part of a forbearance agreement, franchisors are often paid on account of old debt or "antecedent debt" as bk lawyers call it.

For example – if there is \$9 in past due royalties and the forbearance agreement calls for \$3 a month to be paid to franchisor for 3 months – those monthly payments are on account of antecedent debt. A debtor, committee or bk trustee may later seek to recoup those payments made to franchisor within 90 days of the bk filing or 1 year of the bk filing as preference payments.

2. Franchisors may also obtain a security interest in collateral which was not provided under the parties' initial franchise agreement.

A debtor, committee or bk trustee may try to undo that security interest in the event of a subsequent bk filing by the franchisee as being a preference or a fraudulent conveyance.

The look back period for f/c's is one year prior to the bk filing date under the bk code. That period is extended per applicable state law. In many states it's 4 years, some as high as six.

3. In order to mitigate exposure on these transfers as preferential payments or fraudulent conveyances, astute franchisor counsel will specifically detail the consideration which the franchisor is providing to the franchisee as part of the forbearance agreement.

That is the forbearance of franchisor remedies we talked about a few minutes ago. The bundle of rights not being enforced.

Good consideration to defeat a preference or f/c claim is often found by the franchisors' agreement to forbear from terminating the franchise agreement because of the acknowledged uncured defaults and the agreement by the franchisor to forbear from enforcing the other remedies available to it as a result of the franchisee's default.

There are also some cases on this issue in the materials.

See Anand v. Nat'l Republic Bank of Chicago, 239 B.R. 511, 517-518 (N.D. Ill. 1999) (holding that debtor received reasonably equivalent value when bank agreed to forbear on pursuing remedies for default, waived past-due principal payment, and extended maturity date of notes in return for debtor's assignment of interest in real property as collateral to secure loans);

In re Ward, 36 B.R. 794, 799 (D.S.D. 1984) (creditors voluntary forbearance from pursuing remedies was reasonably equivalent value in exchange for debtor's mortgage to secure antecedent debt).

The one I am most familiar with is: Cuevas v. Hudson United Bank, 2002 WL 31412465 (S.D.N.Y. 2002) which was tried by my partner Joe Cerra before Judge Gonzales in the SDNY in 2002.

That case had the typical fact pattern.

It was an undersecured or an extremely undersecured loan from the bank to borrower.

The principals of the borrower guaranteed the loan.

The loan was in default.

The parties entered into a forbearance agreement.

As part of that forbearance agreement, the bank agreed not to issue default or start collection litigation.

The bank also extended the repayment terms under the loan.

In exchange, the bank got a first lien on inventory worth much much more than the loan balance.

As a result of the deal, this loan went from being a non-performing underwater loan to a performing, oversecured loan.

Due to continued business problems, shortly after the forbearance agreement was entered, the borrower filed a bk case.

The bank had negotiated a automatic stay waiver as part of the forbearance, which we will talk about in a couple of minutes, and was able to obtain relief from the automatic stay.

Thereafter, the bank repossessed the inventory which was later sold at auction. As a result of this sale, the bank was paid in full (and the principals of the borrower had their guarantee obligations to the bank satisfied).

After liquidation of the inventory, there wasn't much money left to pay other creditors (which did not have guarantee claims against the principals).

Later on in the bk case, the bk trustee sued the bank saying that the lien it received on the inventory was a preferential payment and/or a fraudulent conveyance.

The trustee demanded all the money the bank received from the sale of the inventory be returned to the bk estate and distributed to creditors on a pro rata basis.

The trustee lost the case.

District Court affirmed bk court issuance of judgment in favor of bank finding that debtor's grant of the security interest in inventory as part of a forbearance agreement was not a voidable preference or a fraudulent transfer. The court found that the bank provided sufficient consideration for the security interest.

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8. Release of all Claims by the Franchisee.

Franchisors will universally require the franchisee and guarantors to deliver a release in favor of the franchisor and its directors, officers, employees, ect.

9. Modifying Terms in the Franchise Agreement.

Franchisors can use the forbearance agreement as an opportunity to restructure terms of the franchise agreement which may be unfavorable to the franchisor.

For example, the franchisor may request:

- (i) withdrawal of monetary incentives;
- (ii) withdrawal of inventory discounts;
- (iii) mutually agreed upon non-renewal of license at conclusion of term;
- (iv) no opportunity for additional units;
- (v) "opening up" of exclusive territory;
- (vi) shortening of notice and cure periods; and/or
- (vi) elimination of other "privileges" provided for under franchise agreement.

Franchisees will counter with their own requested modifications. This list almost always starts (and sometimes ends) with a royalty reduction request. Sometimes it's a request for a temporary reduction.

10. Waiver of the Automatic Stay.

Franchisors routinely demand a provision which waives the automatic stay in the event of a subsequent bk filing by the franchisee.

That waiver is designed to save the franchisor time and money of seeking stay relief in the bk court and also to lessen the risk of denial of a stay relief application by the bk court.

It should be noted that stay waivers contained in initial loan documents or franchise agreements are unenforceable. Stay waivers contained in work out agreements are, however, enforceable.

The case law for each of these situations is in the materials. The materials also contain sample stay relief provisions.

Franchise Responses.

Franchisees can respond to the request for a stay waiver with bk related concessions of their own.

For example, franchisees can request that the stay waiver not go into effect if the franchisee is current in its obligations to the franchisor at the time of the bk filing.

The franchisee can request that the franchisor concede that it is under secured with respect to any collateral held by the franchisor. This could have negative implications to the franchisor in a bk context -- no post petition interest and perhaps not attorney fees.

A franchisee could also request that the franchisor concede that any collateral held by the franchisor is not subject to future decline in value, arguably eliminating or reducing the franchisee's obligation to make adequate protection payments to the franchisor post petition.

11. Miscellaneous Provisions.

There are many in the materials. A few that stand out are:

a. Cross defaults for the franchise agreement, the work-out agreement for all related agreements

b. Confidentiality Provisions. Many franchisors desire to keep the existence and terms of forbearance/work out agreements secret from third parties -- including other franchisees. A sample confidentiality provision is contained in the materials.

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III. PRE BANKRUTPCY ISSUES AND STRATEGIES FOR FRANCHISEES

A franchisee may have to consider bk whether or not it enters into a work out agreement with its franchisor.

The forbearance agreement may relieve financial pressure flowing from the franchise agreement but there could be any number of additional financial problems facing the franchisee:

It could be in default with its secured lender;

it could have a construction loan coming due with no permanent financing;

it could have sharply declining revenues due to an industry wide economic situation – some real estate related businesses come to mind on this one;

It could be anything.

A. Identify the Problems.

When considering bankruptcy, step one for the franchisee is to identify the sources of its business problems.

Step two is to determine if they are fixable.

The franchisee must figure out if its operating losses be reversed and how.

After these two issues are determined, the franchisee can consider what type of bankruptcy case, if any, is appropriate.

B. Not Fixable.

If the franchisee determines that it has fundamental business problems with no viable solution, the franchisee has several practical remedies, all of which involve an ultimate closing:

- (i) sale of the business as a going concern or an asset sale;
- (ii) abandonment of collateral to secured lender and surrender of licenses and leases;
- (iii) state court dissolution;
- (iv) state court assignment for the benefit of creditors;
- (v) chapter 7 liquidation; or
- (vi) a liquidating chapter 11 case.

C. Fixable.

If a franchisee determines that it does have a viable business and predicts that it will be able to turn things around, it can consider a chapter 11 bk filing – and attempt a traditional reorganization.

Because the vast majority of chapter 11 cases fail, I would counsel franchisees, especially small franchisees, to explore every restructuring option outside of bk before jumping into a chapter 11.

The franchise should determine if it can get financing to carry it through this period.

Is a global out of court work out with all key creditors possible.

If it's a multi unit franchisee, can unprofitable units be sold or closed or can the franchisee sell a profitable unit and utilize the profits to shore up units expected to turn around.

Can under-utilized assets be sold to help cash flow.

Can the franchisee earn its way out of trouble by implementing business changes outside of a bk case.

These are all alternatives which should be explored before a decision is made to file a chapter 11.

E. Develop an Exit Strategy.

Sometimes an emergent bk filing is necessary. For franchisees, such emergent circumstances include:

notice of termination of franchise agreement or commercial lease;

motion for the appointment of a receiver;

a pending replevin of needed personal property; or

an imminent foreclosure sale.

In these situations, franchisee's will often show up at a bk lawyer's office the day before a termination of foreclosure sale and want to file bk. These cases almost always fail because of the lack of pre-bankruptcy preparation.

As in most things, preparation is key.

If the debtor needs to file a chapter 11 case, it should be ready to hit the ground running and develop an exit strategy before the filing.

While chapter 11 bk proceedings can be extremely useful tools to shed debt and restructure the financial affairs of the franchisee, the bk process must be accompanied by a business solution in order to be successful.

Simply put, a bankruptcy filing does not increase sales volume or profit margin on whatever the business or service is of the franchisee.

Without a business solution, bankruptcies almost always results in liquidation rather than reorganization.

Bankruptcy cases also do not improve with age. In the ordinary proceeding, the longer that the debtor remains in chapter 11, the less likely the debtor is to emerge as an operating entity.

A primary reason for this is the significant administrative costs which debtors accrue during the chapter 11 process such as bk attorneys and related professionals such as financial advisors, accountants, appraisers, etc. In addition, if a committee is formed in a chapter 11 case, the debtor bears the cost of the professionals retained by the committee as well.

In addition to these costs, and the cash needs of debtors I'll discuss in a minute, the administrative toll on management of debtors in possession should not be discounted.

So, if possible, debtors are wise to develop an exit strategy before entering the world of bankruptcy.

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D. Can the franchisee handle it.

Part of the decision to file should include consideration of whether the franchisee can handle the chapter 11 process.

Chapter 11 is extremely taxing on debtors and some franchisees, particularly small business franchisees, simply can't handle it.

The bankruptcy process and procedures are daunting and persist throughout the case. Among other things, management of the debtor must:

1. Gather information necessary to complete the bankruptcy petition, schedules and statement of financial affairs. This means (a) assembling corporate organizational records, (b) compiling an extremely detailed list of assets and liabilities and (c) detailing the financial operations of the business historically. This is usually no easy task – particularly for a franchisee without a big administrative staff.
2. Prepare a detailed budget and attempt to negotiate a cash collateral budget with secured lenders.

3. Convene a special meeting of the board and obtain a resolution authorizing the filing.

4. Review and understand the Operating Guidelines and Reporting Requirements for Chapter 11 Cases issued by the United States Trustee. Among other things, these guidelines require:

a. that the books and records of the Debtor be closed as of the petition date, and that new books and records be set up to reflect post-petition business and operations.

b. The Debtor must close all pre-petition bank accounts as of the petition date and open new bank accounts which must be designated as "DIP" accounts and maintained in a certain fashion.

One DIP account must be maintained solely for the payment of taxes.

A DIP can't exceed \$100,000; otherwise a collateralization agreement must be obtained from the bank

c. The Debtor must reconcile all monthly bank statements relative to each DIP account and provide them to the UST monthly.

d. The Debtor must forward proof of insurance to the Office of the U.S. Trustee naming the U.S. Trustee as an additional insured.

e. The Debtor must have prepared and filed tax returns for all post-petition obligations, and must make payment on all post-petition tax returns in full.

f. Each month, the Debtor must prepare and file monthly operating reports with the United States Trustee. These reports are detailed accountings of all post petition financial information.

5. All that's just administrative obligations. Still have to deal with post petition financing, claims review, formulating of a plan of reorganization and other substantive bankruptcy issues. And management of the debtor has to do all of this while trying to implement improvements to its business.

6. This is all a tall order for a franchisee – particularly a small franchisee which can't afford to bring in outside professionals to help with the administrative duties.

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F. Cash Needs of a Potential Debtor.

One reason why emergency or unplanned bk filings are even harder to succeed in than normal is a lack of cash. In bk, cash is king. If you are a franchisee planning a bk filing, almost all debtor attorneys will counsel you to stock pile cash before filing.

This is because there are a number of cash guzzling demands on the debtor franchisee in bk which may not normally exist.

Retainers for Professionals. This includes attorneys, accountants, appraisers, and in some cases consultants, investment bankers, auctioneers and others.

The retainer is usually a function of the anticipated work in the case, secured liens, the debtor's anticipated cash flow and ability to pay via carve outs, etc.

For a single unit franchisee, the minimum expected retainer it could expect to pay just to an attorney in a chapter 11 case would be \$25,000. It would not be unusual to see that number be \$50,000 to \$100,000. Multi unit franchisees could expect to pay more.

Pre-Petition Payroll. Most Bk courts will entertain an application to pay the pre-petition payroll and employee benefits under a "necessity of payment" doctrine. The debtor must anticipate the need for cash to pay both the pre-petition payroll, and the payroll that accrues from the date of the filing.

A related issue is that of key employee retention plans or kerps. These are bonuses that key employees may demand in order to stay with the debtor during the chapter 11 process. While these bonuses are somewhat harder to get under the new bk amendments (October of 2005), and while you only usually see them in larger cases, you do see them in multi-unit franchisee bk cases. If you are a fairly large franchisee considering bk, this is another cash expense you should plan for.

Pre-Petition "Critical" Vendors. Depending on the debtor's business, some pre-petition vendors, who are also pre-petition unsecured creditors, simply must be paid. This is usually because they provide a critical product or service that cannot be obtained elsewhere.

When that vendor will not provide the debtor with its product or service, under any circumstances, unless its pre-petition obligation is paid, that vendor is obviously "critical". The debtor must make a strong showing to the court for authority to pay certain pre-petition "critical" vendors, but in some cases it is unavoidable. The debtor should anticipate what these costs will be.

C.O.D. [Cash on Delivery]. This one is so obvious that it is sometimes overlooked. In most circumstances, the pre-petition debtor's financial situation

has deteriorated to the point where most of the debtor's vendors have put the debtor on C.O.D already. However, in certain circumstances, that is not the case.

It is a rare debtor who gets good supplies and services on open credit after a Chapter 11 is filed. This will exacerbate the debtor's need for cash and should be anticipated as part of the pre-petition planning.

Utility Deposits. The 2005 bk amendments strengthened the rights of utilities to receive "assurance of payment" for post petition utility services.

The new Code as added a §366(c), which defines what "assurance of payment" is. Previously the debtor could get away with the availability of an administrative expense priority, or other non-cash assurances of payment. That is no longer the case. The new §366(c) specifically excludes that as a form of adequate assurance of payment.

Bottom line, the debtor will have to come up with "cash" or "cash equivalent" for its utilities as a deposit to deal with §366 utility issues. In a business that uses significant utilities, this amount could be significant.

Reclamations. The recent amendments to the bk code on reclamation rights to vendors strengthen those rights significantly. The potential for large administrative claims that will have to be addressed as part of the plan, or perhaps pursuant to a motion to compel payment of an administrative claim by a reclamation vendor, could be significant.

Cure Costs. If the debtor franchisee decides to assume an executory contract or unexpired lease, the debtor is required to cure the outstanding monetary default upon assumption or shortly thereafter. See 11 U.S.C. §365. Assumption costs can be one of the most significant cash obligations of a debtor franchisee and, accordingly, must be taken into account.

United States Trustee Fees. These are set forth in 28 U.S.C. §1930. Depending on the nature of the debtor's business and the extent of the disbursements, these fees may or may not be significant. Nonetheless, these should be brought to the attention of the debtor pre-petition, so that they can plan accordingly.

Cash Collateral Orders. Most chapter 11 debtors consult with their secured creditors who may have an interest in cash collateral and hope to enter into a consensual cash collateral order.

Absent consent, the debtor must anticipate proceeding with an application to use cash collateral over the secured creditor's objection.

In either event, the debtor will have to prepare a detailed budget that anticipates realistic cash receipts, and realistic cash disbursements.

Rest assured that most secured creditors will scrutinize the budget very carefully, and will not consent to any expenditure which they deem not to be necessary, or could otherwise impact their collateral.

G. Bk Imposed Deadlines.

A chapter 11 filing imposes a number of deadlines and restrictions upon franchisees. I'll talk about two which relate to franchisees:

1. Unexpired Leases of Non-Residential Real Property.

Recent amendments to bk code have changed the deadline for assumption or rejection of unexpired leases of non-residential real property.

Now, a lease must be assumed or rejected within 120 days after the filing, with one 90 days potential for extension of that time period for "cause".

Any extensions beyond 210 days from the date of the chapter 11 filing may only be made with the debtor's consent.

2. Time Periods for Assuming or Rejecting Franchise Agreements.

Franchise agreements are executory contracts.

The bk code says that the debtor may assume or reject an executory contract at any time before the confirmation of the plan, but the court may enter an order setting a specified period of time whether to assume or reject.

The bk court has discretion to determine what constitutes reasonable time to assume or reject an executory contract. There is caselaw in the materials about guidelines used by courts to set assumption/rejection deadlines.

3. The Debtor's Obligations Under the Franchise Agreement Pending Assumption or Rejection.

Pending assumption or rejection, the franchise agreement remains binding on both parties.

H. Things to Avoid.

When a franchisee is considering a chapter 11 bk filing, there are two things that a franchisee wants to avoid:

The first is

Uncurable Pre Petition Defaults Under the Franchise Agreement.

As discussed in detail in the materials, certain uncurable pre petition defaults by a franchisee under a franchise agreement may preclude the debtor from assuming or assuming and assigning the franchise agreement post petition.

This could have disastrous economic consequences for a franchisee who values its franchise agreement.

Second

Avoid Effective Termination of Franchise Agreement.

If a franchise agreement is effectively terminated pre petition, it does not become property of the bk estate.

If the franchise agreement is not property of the bk estate, the automatic stay doesn't apply and the debtor is barred from attempting to assume or assume and assign the agreement. There are a number of cases and discussion in the materials on this point.

An effective pre-petition termination is a powerful weapon for franchisor who does not want to participate in a franchisee bk case.

BIOGRAPHY OF DANIEL M. ELIADES

Daniel M. Eliades is one of the founding members of Forman Holt Eliades & Ravin LLC and heads the firm's national franchise related bankruptcy practice. Mr. Eliades regularly represents franchisors in franchisee bankruptcy cases throughout the United States. That representation includes the collection of unpaid royalties, the negotiation of the assumption or rejection of franchise agreements, the protection of the franchisors' intellectual property and bankruptcy litigation of all franchisor/franchisee disputes. Mr. Eliades has been admitted *pro hac vice* in dozens of bankruptcy courts throughout the country in connection with his representation of some of the largest franchisors in the world. Mr. Eliades can be reached at 201-845-1000 or deliades@formanlaw.com.

BIOGRAPHY OF VAN ELMORE

Van Elmore has been licensed to practice law in the state of Colorado since 1977. His 20 plus years of Professional experience have been at both the executive level of corporate management and in private practice. The primary emphases of Mr. Elmore's legal practice are franchising, Intellectual property, software and Internet issues, as well as arbitration and mediation. He has been involved in all aspects of franchising in the United States, and has been involved in international franchising in Canada, Mexico, Belgium, Indonesia, Taiwan, Kazakhstan and in Russia. He is a frequent speaker on domestic and international franchising. He previously served as Vice President and General Counsel for a 450-unit franchise system. In private practice since 1992, Mr. Elmore concentrates in franchising, software, trademarks, Internet, trade secrets, and arbitration and mediation. In addition to representing both franchisors and franchisees, Mr. Elmore handles all types of franchise dispute issues, such as: termination, misrepresentation & fraud, royalty collection and non-compete. He also has created and assisted franchisee associations. Mr. Elmore has served as co-counsel and as supervising attorney for several franchise and trademark related litigations.

Mr. Elmore is a mediator and arbitrator and has served as a neutral for high tech, franchising, insurance, business and employment disputes. Mr. Elmore also speaks on alternative dispute resolution.

Mr. Elmore represents software developers in regard to licensing, mergers, acquisitions, and intellectual property protection. He has also advised computer network licensors regarding avoidance of franchise statutory coverage. In addition he has advised Internet vendors regarding contracts. He has given presentations regarding Internet, software licensing and copyrights. In his representation of software developers, Mr. Elmore provides legal services regarding copyright registration and infringement, licensing, trade secret issues, corporate issues, employment agreements and non-compete issues, as well as development agreements, outsourcing and mergers and acquisitions. Mr. Elmore represents Internet businesses regarding contractual and intellectual property issues.

Mr. Elmore is a member of the ABA Forum on Franchising and is serving on the Solo and Small Firm Network. He previously served on the Steering Committee for the formation of a new division of that organization for Alternative Dispute Resolution and Litigation. He also served on the ABA Antitrust Section Committee on Franchising's Task Force on Legislation and Regulation. Mr. Elmore is also a member of the International Franchise Association and serves on that organization's Legal Legislative Committee.

Mr. Elmore has been a franchisee and previously worked as an attorney and lobbyist in the Oil and Gas industry. He received his Juris Doctorate Degree from the University of Miami School of Law where he was on the Dean's list and participated in the Moot Court Competition and the Clinical Program. Mr. Elmore received his Bachelor's degree in Sociology, with a concentration in Chemistry, from the University of North Carolina - Chapel Hill. He is also proficient in the Russian Language.