

Worried about a Sears Insolvency? Here are 5 Lessons from the Target Canada Insolvency for Landlords to Remember

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Unfortunately for the Landlord community in Canada's retail space, the flood of retail insolvencies is likely not over. In addition to open speculation about Sears, 2016 has already seen the insolvency of major Canadian retail locations previously occupied by Danier Leather, Aeropostale, PJ Pets, and Goodwill. There are likely more on the horizon.

In the Target Canada insolvency, because of the large size of the stores involved, the large amounts of money at stake, and the relatively short period between Target's arrival and exit, the Landlord bar was very active. As such, the battles fought provide 5 useful lessons which show the difference activist Landlord counsel can make to ensure Landlords get the best possible outcome from a bad situation.

Consider the Whole Structure: In any large insolvency there may be important intercompany claims which bear investigation in the current insolvency. In Target, at the Landlord counsel's urging, the court appointed Monitor ultimately reviewed and found that, as a result of the intercompany debt and sale lease back structures employed by Target, the intercompany claims of Target Corp were subject to challenge. The Monitor ultimately disallowed over \$600,000,000 in claims on this basis. Challenging the intercompany debt structure in this fashion provided valuable leverage in the negotiation of the Target Plan, which ultimately increased the dividend paid to the Landlord's under that Plan.

Claim against Everyone: Target demonstrated that where multiple related entities have filed for insolvency protection, it is important to realize that they may not all have the same creditors or the same assets to distribute at the end of the process. In Target, claims made against certain of the Target entities allowed for payment in full of claims, when the same claim against other entities would have only resulted in a 70% recovery or less. Not every Landlord claimed against every entity. For those who did, by claiming against all the entities, they ensured that

they did not miss out on the opportunity to be in the best possible position to recover as much as possible, or to provide leverage against plans by the debtor to consolidate its estates.

Read the Release: As part of its sale process, Target ultimately assigned several of its store leases to substantial entities like Canadian Tire and Walmart. It also in some cases entered into agreements with Landlords under which those Landlords agreed to reacquire their own leases. In both cases, however, Target sought releases from Landlords of any future claims in the CCAA process arising from the assigned leases. Given that, as of the writing of this article, Target is looking to pay Landlords a dividend in excess of 70 cent on the dollar for these claims, those Landlords who had the foresight to reserve their rights to these claims, rather than just giving a quick release without giving it much thought, were able to secure some additional recovery from the process. Indeed, even where the lease was being assigned to a solvent entity, it was shown in several cases in Target that there was value in the arguing that the assignment should not have the effect of release the assignor from all their obligations.

Impact on Co-Tenancy Clauses – In Target, the Landlords were able to negotiate that a stay be put in place during the CCAA that prevented all co-tenants of the Landlord from asserting their rights against the Landlords which would otherwise have been made by co-tenants against the Landlords as a result of Target's insolvency. While this may ultimately have, in some cases, merely delayed the ability of those co-tenants to assert their co-tenancy rights (such as reduced rent or lease termination) in other cases, where the Target store was assigned for example, it may be that the tenants never assert these rights. Getting this stay in place can, especially in an insolvency where there is likely to be little to no recovery to the Landlords, ultimately prove to be more important than any other feature of the insolvency. In some cases, the monthly loss to the Landlord for a particular plaza with a now dark anchor tenant could have resulted in millions of dollars of lost rent from the co-tenants during the Target CCAA process.

Protect the Guarantee: No Landlord will be surprised to discover that the Landlords in Target who had guarantees from the Target Corp US ultimately had a better recovery in the Target Insolvency than those who did not have them. Indeed, those people who did not get guarantees from Target are likely not making that mistake again with new tenants, no matter how manifestly solvent the proposed tenant is. However, the bigger surprise in Target was the fact that Target tried to use the CCAA process to compromise the guarantees given by Target Corp. They were not able to do so, however, due to excellent early stage work by counsel who got not one, but two pre-emptive Court Orders, confirming that the guarantees were not to be touched. To many at the time these orders were sought, it seemed like paranoid overkill, but it proved to be essential when Target made its intentions clear and tried to force the compromise of those guarantees. Taking the time to anticipate and pre-emptively deal with potential dangers to the sanctity of the guarantees made millions of dollars of difference to multiple landlords in the Target case.

In the future, if Sears or any other large retail entity files for insolvency, retaining counsel to make sure that these hard won lessons from Target are not forgotten in that file will almost certainly pay dividends to the landlords who remember these 5 lessons.

