The most recent edition of *The Wall Street Journal's* excellent Examiners series focused on an issue of increasing importance within the restructuring community – whether the treatment of customers in bankruptcy cases of retailers is fair. The published responses from distinguished attorneys, financial advisors, and investors highlighted many of the complex considerations that companies face when balancing the requirements of the Bankruptcy Code with the interests of customers.

In interpreting the question of fairness that was posed, many respondents focused on the issue of distributional fairness. That is to say – what do customers receive on account of their claims against the bankrupt retailer relative to the retailer's other creditors? This is not a surprising focus, given the Bankruptcy Code's priority schemes and the efforts made in large corporate bankruptcy cases to bend those requirements to the individualized business needs of a company hoping to reorganize successfully.

From the perspective of distributional fairness, customers fare quite well in retail bankruptcies. Retailers that file for Chapter 11 with plans to reorganize almost uniformly seek immediate relief to continue honoring gift cards, accepting merchandise returns and providing a seamless shopping experience for customers. The argument is that the continued patronage of those customers will be necessary to a successful reorganization and bankruptcy courts rarely deny such requests.

However, as my friend and former colleague Jack Butler of Hilco noted in his response, an increasing number of retailers have filed for Chapter 11 and liquidated in recent years. The business justification for voluntarily honoring pre-bankruptcy obligations to customers when the company's stores will close in 30-60 days is much more attenuated. Nevertheless, liquidating retailers still frequently seek – and are allowed – to honor customer obligations for a period of time after the bankruptcy filing. For example, clothing retailer Delia's continued to honor gift cards and accept returns for several weeks after its December 2014 bankruptcy filing even while liquidators were running going-out-of-business sales in all of the chain's stores.

Finally, many acknowledge that holders of gift cards who fail to redeem them may be entitled to priority treatment of their claims pursuant to section 507(a)(7) of the Bankruptcy Code. While not a guarantee of payment in full, it does place even gift card holders that do not take advantage of the opportunity to use the balance for goods and services in a much more enviable position than most other unsecured creditors. Moreover, the $2,775 cap on the priority claim means that the vast majority of customers will see their entire claim entitled to priority. For example, the average gift card balance in the bankruptcy of the Borders chain of bookstores was only $11.89.

However, there is a second aspect of fairness which received far less attention in the published Examiners responses – procedural fairness. This requires that we ask whether the process that is followed in retailer bankruptcy cases provides customers with a fair opportunity to exercise their rights as creditors and participate in the bankruptcy proceedings to the extent they so desire. This is a crucial question to be asked because distributional fairness is only meaningful if there is also procedural fairness, at least in cases involving liquidating retailers. Said differently, if a creditor is not provided with a fair chance to participate in the bankruptcy process, it matters little what that creditor would receive because he or she is unlikely to ever receive anything. I believe that the widely-accepted methods of providing notice to customers in bankruptcy serve to deprive customers of a fair opportunity to participate and, therefore, should be improved.

A bit of background may be helpful to understand the genesis of the current process and the opportunities for improvement that are available. A long line of jurisprudence has established that bankrupt companies have different obligations when providing notice to "known" creditors as opposed to "unknown" creditors. Gift card holders and most other potential creditors whose claims are based upon being customers of the bankrupt retailer are treated as "unknown" creditors. This view was supported by Bankruptcy Judge Martin Glenn (S.D.N.Y.) in the Borders bankruptcy. As a result, he determined that Borders had provided such creditors with sufficient constructive notice of the deadline to file claims by publishing a notice one time in the national edition of *The New York Times*. By comparison, "known" creditors were entitled to and did receive actual written notice of the deadline by first class mail.

Historically, relying on publication notice was relatively easy to justify. Retailers realistically do not know with any level of certainty the identities of the holders of their gift cards (they are, after all, intended to be given away by the purchaser as a gift). Even if a large retailer might know that some of its customers are likely creditors, providing actual notice by mail to millions of former customers is cost-prohibitive. For example, RadioShack reported in court filings that it held 67 million complete customer name and address files. Forcing all creditors to bear the cost of printing and mailing 67 million notices is nearly impossible to justify merely on the grounds of unearthing the small percentage of those parties that would assert claims. It is not hyperbole to suggest that the cost of notification would likely exceed the face amount of the resulting claims.

The opportunities to provide cost-effective notice to customers are much different today, however, than they were when R.H. Macy filed for bankruptcy in 1992. While we continue to rely upon antiquated and largely ineffective methods of constructive notice such as the Borders notice buried deep in one daily edition of *The New York Times*, we have largely ignored simpler, less expensive and likely more effective means of notice now available. For example, Borders held a consumer marketing database of 48 million individual email addresses, the vast majority of whom were current or former members of the company's customer loyalty program. Borders emailed all Borders Rewards members to inform them that the stores would be closing – with a somewhat vague reference to gift cards being honored for only a limited time – but did not utilize their email list to enhance their constructive notice efforts for "unknown" creditors despite the likely overlap between the two groups. Could anyone reasonably believe that more potential creditors actually received notice through publishing a notice in a newspaper with a daily circulation of less than two million than would have through an email to 48 million people who have self-identified as wanting to receive information specifically from Borders?

An additional opportunity to improve customer notification and procedural fairness of the bankruptcy process is presented by the growth of social media. For example, over 2.7 million people have "liked" RadioShack's official Facebook page. Similar to the members of an opt-in email list, this following almost certainly represents many of the company's most active customers and, as such, a subset of those "unknown" creditors who are most likely to hold valid claims. Despite this, the company postings on RadioShack's Facebook page do not make any reference to the company's bankruptcy.

Therefore, the restructuring community should adopt a new paradigm for notification of customers in bankruptcies of retailers. That new model must reflect the additional, and better, avenues now available to apprise "unknown" creditors of their rights and how to assert those rights. Not only would these changes benefit customers, they should also benefit all creditors and possibly even the debtor's chances of reorganization.

When seeking authority to continue to honor customer programs – even in the context of liquidation – bankrupt companies routinely assert that the cost is justified by the positive financial impact of maintaining good relations with customers. If those statements are accepted as valid, then it follows that doing a better job of notifying customers of the continuation of those customer programs would also be beneficial. Moreover, the cost of social media and email noticing ranges from minimal to free, while publishing notices in major newspapers costs thousands of dollars or more. Therefore, even if it fails to generate additional customer goodwill and sales, better noticing would at least preserve more of the assets of the estate for ultimate distribution to creditors.

While the legal system is notoriously slow in technological adoption, there are signs that these changes may be on the horizon. In the Sharper Image bankruptcy, Delaware Bankruptcy Judge Kevin Gross approved of notice procedures that included online banner advertisements and Facebook advertising in addition to, but not in place of, more traditional notices placed in print publications. Notably, the online advertising, which was expected to generate 19 million impressions, cost approximately 20% less than publishing the notice in *People* and *Sports Illustrated* magazines.

District Judge Andrew Carter Jr. (S.D.N.Y.), in considering an appeal of the Borders decision discussed earlier, also noted that, "[w]hile there is room for debate regarding how notice should be sent to gift card holders . . . it seems apparent a solution could be devised to provide notice that is more targeted than publication." He then expressly referenced the use of email and social media, but also acknowledged that whether those mediums would meet due process requirements was "an open question." Unfortunately, because Judge Carter, and the Second Circuit Court of Appeals after him, upheld the bankruptcy court's decision on equitable mootness grounds, the issue of using email and social media for constructive notice was never decisively addressed. Each new bankruptcy filing by a retailer presents a new opportunity to move our industry forward to the benefit of everyone involved. We should all hope that those chances to utilize new media and technology are capitalized upon sooner rather than later.

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