AMERICAN BANKRUPTCY INSTITUTE
MEDIA TELECONFERENCE TO EXAMINE THE FUTURE OF REAL ESTATE INDUSTRY DISTRESS

INTRODUCTION

JACK F. WILLIAMS[*]

Times are very hard in the real estate sector. Residential real estate development is in a national slump with access to capital very limited to virtually non-existent, demand down, consumer confidence down, real estate values down, and inventories way up. Commercial real estate appears no better.

We at the ABI introduce you to an excellent panel of experts on financial distress in the real estate sector. The panelists are knowledgeable and informative, drawing on a wealth of practical and varied experiences relevant to the subject matter at hand. They will provide key insights on the issues percolating in the real estate sector. Enjoy their thoughtful comments.[1]

TRANSCRIPT

John Hartgen (ABI): Thank you and welcome to today's conference examining Future Distress in the Real Estate Sector. Distress in the real estate industry continues to be felt around the world. The liquidity that was once available for residential and commercial real estate projects and financing just a few months ago has evaporated, foreclosures continue to increase, and the financial institutions that held the debt associated with the housing boom continue to buckle under the financial strain.[2]

Joining us today are a panel of experts specializing in real estate company restructuring. They will be discussing the problems currently being experienced in the marketplace, as well as what future trends might lie ahead for the real estate sector.

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[1] The comments made in this roundtable discussion are those of the panelists and moderator, and do not necessarily reflect the views of their employers, organizations, the American Bankruptcy Institute, or St. John's University School of Law. The discussion took place on December 10, 2008.

[2] *See* Peggy Crawford & Terry Young, *The Credit Crunch: The Roller Coaster Ride Continues*, 7 J. BUS. & ECON. RES. 115, 115–16 (2009) (discussing genesis of mortgage crisis and how it has led to today's credit crunch); *see also* Major Coleman IV et al., *Subprime Lending and the Housing Bubble: Tail Wags Dog?*, 17 J. OF HOUSING ECON. 272, 272 (2008) (describing "recent turmoil in the mortgage market" and resulting consequences); Karen Weaver, *The sub-prime mortgage crisis: a synopsis*, *in* GLOBAL SECURITIZATION AND STRUCTURED FINANCE 2008 22, 22 (Globe White Page Ltd., 2008), *available at* http://www.globalsecuritisation.com/08_GBP/GBP_GSSF08_022_031_DB_US_SubPrm.pdf (explaining how it is expected that home prices will continue to fall as foreclosures increase because of sub-prime mortgage crisis).

Our speakers include **Rebecca "Becky" Roof**, a managing director at AlixPartners in New York. Joining Becky is **Greg Apter**, a principal and president of Hilco Real Estate in Chicago.

Our moderator for the program will be **Professor Jack Williams**, ABI's resident scholar. Professor Williams teaches at Georgia State University College of Law, where he instructs an assortment of bankruptcy and tax courses. I'll now turn it over to our moderator for the program, Professor Jack Williams.

Williams: Thank you very much, John, and good afternoon ladies and gentlemen. Today we have a wonderful panel that will be speaking on a number of issues within the distressed real estate sectors.

I'd like to turn now to Greg Apter who will be discussing some of the issues and developments in the area of consumer and homebuilder bankruptcies.

Apter: I'd be happy to. There are two paths of discussion here, the first being an historical perspective to provide some background and context for the second path, where the marketplace is going. Historically, the last meaningful bankruptcy cycle probably occurred just prior to the passage of the Omnibus Reconciliation Act, which essentially modified key provisions of the Bankruptcy Code.[3] Since then, and until 2008, there have been relatively good times, wherein we had a booming economy coupled with an extraordinary availability of capital, both of which contributed to the prolonged operation of numerous companies that might otherwise have failed. Additionally, economic conditions enabled many of these companies, as well as private equity funds and others, to layer enormous amounts of debt onto their balance sheets. What few paid any attention to was the reality that all this debt would not only require companies to at least maintain their current level of sales, but in some cases even require significant growth in order to cover just the debt service.

As we know, in the past year or so, sales for most companies have plummeted and there's virtually no capital available to fuel expansion for the much-needed growth. A dearth of capital is also compounding the problem as all that debt is now coming due and companies are unable to refinance their balance sheets. The net-net of it all is that we are seeing overdue and normal-course business failures plus, and this is the disconcerting part, we have fundamentally good companies struggling to survive and, in many cases, failing under the weight of diminished sales, astronomical debt and the lack of available capital.

Williams: Becky, what are your thoughts on homebuilder bankruptcies?

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[3] *See Omnibus Reconciliation Bill Contains Judgeship, Circuit Split, More*, 24 AM. BANKR. INST. J. 3, 3, 77 (Dec./Jan. 2006) (discussing changes made to bankruptcy system by Deficit Reduction Omnibus Reconciliation Act of 2006).

Roof: Jack and John, thank you very much. Ladies and gentlemen, good afternoon. As Jack mentioned, I'd like to address some of the issues that we're seeing in the homebuilding struggles right now, which are well publicized and well documented. And I'd like to talk a little bit about how we got there in the first place. And the answer is pretty easy. It was just caused by an unprecedented availability in mortgages, which from years 2001 to 2005 just ran up the demand for homes and then, which in turn, drove inflation-adjusted annual price increase to levels far above historical averages.[4]

You have to remember that for years and years and years, between 60 and 64% of Americans owned homes.[5] Then between 1990 and 2005, this trend increased by over 500 basis points to 69%.[6] At the same time home prices, which had only increased at the same rate of inflation, 2.3% annually, from 1940 to 2000, suddenly started increasing at 11% per year from 2000 to 2005. And during the same time period there really was no increase in the real income of the American consumer. So what that means is that interest in home ownership was driven entirely by credit availability.

Up until the year 2000, the amount of mortgages outstanding, as a percent of gross domestic product, or GDP, was below 50%.[7] And by 2005, the amount of mortgages outstanding in the United States had increased to almost 70% of GDP.[8] So there was a tremendous shift here, and that was almost completely funded by what we call non-traditional mortgages, and those would include the sub prime, no equity, zero percent down, or and the alternative rate on adjusting rate mortgages. So we created this perfect storm that we've now encountered.

Today, there on a national average, there is a one-year supply of new homes on the market. That is a national average. In many markets, such as Phoenix, Las Vegas, the Florida markets, there is—I've seen estimates as high as 24 and 36 months of inventory. And I'm talking there about the single-family homes, not condominiums.

There are projections that home prices on a national average will decline as much as 15% from where they are today. And that's on top of the markets that have already declined by 25 and 30%. So we have just had a tremendous amount of

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[4] *See* Dean Baker, *The Housing Bubble and The Financial Crisis*, 46 REAL WORLD ECON. REV. 73, 74 (2008), *available at* http://www.paecon.net/PAEReview/issue46/Baker46.pdf (discussing how low mortgage rates available to homebuyers caused an increase in consumption creating housing bubble, which eventually led to mortgage crisis).

[5] *See* U.S. CENSUS BUREAU, HOUSING VACANCIES AND HOMEOWNERSHIP-HISTORICAL TABLES, Table 14, *available at* http://www.census.gov/hhes/www/housing/hvs/historic/index.html (showing percentage of American homeowners from 1965 to 1990 ranged approximately between 62% to 64%).

[6] *See id.* (revealing 5% increase in total number of American homeowners between 1990 and 2005).

[7] *See Housing and the Business Cycle*, WORLD ECONOMIC OUTLOOK 105, 105 (International Monetary Fund, 2008), *available at* http://www.imf.org/external/pubs/ft/weo/2008/01/pdf/text.pdf (showing through figure 3.1 percentage of outstanding mortgage debt as percentage of GDP was below 50% in 1990).

[8] *See id.* (showing through figure 3.1 percentage of outstanding mortgage debt as percentage of GDP was above 70% by 2006).

equity just disappear. When you layer that on top of the current consumer confidence, it is not a pretty situation.

Looking for statistics here on consumer confidence. Consumer confidence actually was at an all time low in October.[9]

It has rebounded slightly in November. However, new home sales also declined in October. And if you look at the permits that are being issued now, there is nothing to indicate that that trend is going to reverse.

If there is any good news in this, it is that the consumer confidence did increase slightly in November, and it's also that homebuilders are taking very aggressive actions to manage their inventory down. They have stopped building in a lot of areas, and there are a number of incentives, deals, and aggressive marketing tactics that the homebuilders themselves are taking to bring inventories down. There's a long way to go.

Just a couple of comments about the restructuring process for homebuilders, particularly that as they find themselves in an insolvent situation. I think everyone is struggling with how low the values are going to go and what kind of impairments to take for both finished inventory and undeveloped land that builders are carrying on their balance sheet. There are a number of companies that are currently in chapter 11, which include Tousa, which is a national homebuilder, and WCI is a national builder, Levitt & Sons in the Southeast, Caruso Homes in the Mid-Atlantic, Newman Homes in the Midwest, along with Kimball Hill.

There are many other national and regional homebuilders who are in discussion with their banks who have covenant or debt challenges. And again, given the inventory on the market, the asset price recovery is probably several years away.

There are a couple of other things that make restructuring of homebuilders particularly challenging. First of all is always the issue about consumer and customer confidence. Many customers are hesitant to buy a home from a builder that they believe may not be around to honor their warranties.[10] So there is a public relations management effect that makes home building particularly challenging.

Lenders are weary of having real estate in their workout group. And so there really is a limited opportunity for a true restructuring. And it's also difficult to make a lot of improvements in the operations of the homebuilder. By that I mean it's often difficult to find ways to cut costs without damaging a builder's reputation or products. Many of these cost reductions have already happened, and home building is largely driven by commodity prices, for which the homebuilder doesn't

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[9] *See* V. Dion Haynes, *Downturn Pummels Consumer Confidence*, WASH. POST, Oct. 29, 2008, at D1 (finding consumer confidence fell to 38% in October 2008, "its lowest level on record").

[10] *See, e.g.*, Vicki Gerson, *When Building Firm Goes Bankrupt*, CHICAGO SUN-TIMES, Dec. 14, 2007, at S5, *available at* 2007 WLNR 24687135 (indicating potential home buyers may protect themselves from warranty service issues by examining builders prior to purchasing homes); John Spence, *More Grief Predicted for Home Builders*, MARKETWATCH, Sept. 10, 2008, *available at* http://www.marketwatch.com/news/story/restructuring-firm-sees-more-pain/story.aspx?guid=%7B5F8BB692-41B3-45B7-8962-8CDA68F7EE0A%7D (noting lower consumer confidence as one issue facing distressed builders).

have any control over. I think a lot of people are just trying to find enough cash to operate on for a year or two, warehousing their properties, their land, and hoping that the market returns.

Given where the credit markets are right now, trying to find financing to operate as a debtor in possession in chapter 11, or even trying to find exit financing to come out of a chapter 11 is difficult, if not practically impossible these days. And so for many of the homebuilders, their alternatives are so few that by the time it comes to the point where they might be able to think about filing for chapter 11, they're really at the point of liquidation.

And a final point, again back to the banks—with the bank difficulties in their own industry, and the number of mergers that are going on right now—it's very difficult to get the attention and focus from a bank right now to restructure a homebuilder loan. And that is adding to the complexity.

So with that, Jack, I can turn that back over to you and I'd be happy to answer any questions at the end of this call.

Williams: Great, thank you Becky, that was very informative. Greg, how about just walking us through some of the issues in the retail sector—retail real estate?

Apter: Let's take a couple of steps back. From an historical perspective, and much of this really is an extension of what Becky was just talking about, we saw an incredible amount of low-cost capital pour into the markets, which fueled expansion in retail, mergers and acquisitions and dividend refinancings that returned significant profits to investors. All this contributed to the placement of unprecedented leverage on retail company balance sheets since the last bankruptcy cycle. Now, we are seeing depressed sales and, concurrently, quite a bit of debt coming due in the short term with minimal capital available to refinance the debt. We are also seeing lender covenants in [the] process of being violated due to depressed sales. And so, we are seeing not just normal course business failures, but failures of companies with a reason to exist in the long-term.

Now, with all that as a backdrop, we can turn to the retail real estate issue. Until recently, the bankruptcy law changes, particularly as they relate to real estate and vendor administrative claims, had not truly come into play on a mass scale. Cases had been on more of one-off basis. However, in the past 12 months, we've seen eight or even ten high profile retail bankruptcies, including Linens-N-Things, Mervyns, Goody's, Steve & Barry's, Boscov's, Circuit City, the recent Bally Total Fitness filing, and Value City among others. So, we have all these fairly large, high-profile retail bankruptcies and they're all hitting the market at once. What really makes this unprecedented is that most filings are resulting in liquidation rather than a restructuring and successfully emergence from bankruptcy. Several factors are driving this, including a lack of capital to finance a restructuring, depressed consumer spending and additional burdens placed on the debtor by the bankruptcy law changes of several years ago.

Specifically, retailers are affected by the new section 503(b)(9)[11], which essentially gives vendors an administrative claim for any inventory or goods that are shipped within 20 days of a filing. Then you have the real estate-related burden of having to—as a practical matter—decide within 210 days whether to assume or reject leases. The problem is, those decisions cannot easily be made within 210 days. It would be more realistic to minimally have an additional three to four months to make such decisions. Here's an example. Suppose, after some reasonable passage of time, the debtor and its restructuring advisors elect to reject a lease. Ultimately, the inventory and fixtures will have to be liquidated, which may require three months or so to complete that process. So, under the 210 day provision, the decision-making process must be significantly compressed in order to allow for ample time to liquidate assets.[12]

As Becky mentioned earlier, capital is virtually unavailable and what's out there is very expensive. Lenders can essentially decide what they want to do and do not want to finance, and right now there's certainly an aversion to high-risk transactions like bankruptcy restructurings when they can get reasonable returns at similar rates for transactions that are A-quality credits.

So, it is the convergence of all these forces that's causing some real pressure on retailers and resulting in a spate of big bankruptcies leading to liquidation. The consequence is a dramatic amount of retail space coming into the market, near term. Adding what came onto the market in the past six months to what we at Hilco Real Estate estimate will hit the market in the next six months, it looks like 100-million plus square feet of retail space.

Add to that, the retail developments that are either recently completed or still being built, which will add to the inventory already out there, and there's a true crisis building. Remember, we are not seeing many retailers in an expansion mode, whether it's because most companies can't handle the financial burdens or because they are simply taking a market-driven wait-and-see attitude. This is all causing fairly significant downward pressure on the rent, and in turn, retail property values.

In addition to the downward pressure on retail property values caused by the flood of bankruptcies and overcapacity, the tightened credit market has further depressed values by making it extremely difficult for buyers to finance acquisitions. Previously, lenders would finance properties with 80% or even 90%+ loan to value. Now, the number is more like 60 to 65% LTV. As a result, far more equity is required, which has sidelined many investors.

Investors that had been adding to their portfolios of real estate, retail or otherwise, were buying in at 6 caps or 6-1/2 caps, but are now either out of capital or they have simply decided to wait until there's a 9-1/2 or 10+ cap deal on the table.

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[11] 11 U.S.C. § 503(b)(9) (2006) (detailing allowance of administrative claims).

[12] *See* David G. Epstein, *BAPCPA and Commercial Credit: Who (Sic) Do You Trust?*, 10 N.C. BANKING INST. 57, 63 (2006) (stressing potential inability to make timely business decisions under BAPCPA 210-day cap).

Lastly, investors are concerned about issues related to property level debt. What happens if and when space in a portfolio investment comes back onto the market as a result of a bankruptcy and subsequent lease rejection? It will be competing with hundreds of other spaces coming to the market. The investor is rightfully concerned about how to service the debt on a property level. As I stated earlier, we, at Hilco Real Estate, think the problem of excess space will compound in the coming months, whether it's due to ordinary course bankruptcies or companies unable to satisfy their debt requirements. There will be quite a few foreclosures, quite a few keys being delivered to lenders. And, at some level, there may be a problem with lenders even being willing to accept locations. They're just not staffed and equipped to manage properties properly. So, there could be fights over whether or not lenders will even be willing to accept properties, because they're just not equipped to manage the locations that are going to be sitting as REO property.[13]

The outlook for retail real estate isn't great. This consortium, if you will, of retail problems, debt problems, and property level problems are going to cause some pretty significant headaches in the coming months.

Williams: Thank you very much Greg. That, too, was interesting. Greg, in the retail area, it wasn't too long ago, it seems, that when you would, in a bankruptcy proceeding, notice up the auction of leases that you find your room just filled to capacity, if not beyond. And I've heard tell lately that people aren't showing up anymore. I was wondering what your take might be on the near future in the retail real estate sector?

Apter: That's an interesting question, because we have found over the last three or four years, when everything was going so smoothly, that landlords weren't so cooperative in a bankruptcy to restructure leases and renegotiate the rents. As a result of that, many of locations were either abandoned by the retailer through liquidation or, in a strategic downsizing, were auctioned off, raising literally millions of dollars.[14] Today, we probably have three or four auctions in process. This is, without a doubt, the quietest period we have ever seen in this sector relative to acquiring new locations through the bankruptcy process.

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[13] *See* Governor Randall S. Kroszner, Board of Governors of the Federal Reserve System, Speech at the NeighborWorks America Symposium in Cincinnati, Ohio, on Stabilizing Communities in the Wake of Foreclosure (May 7, 2008), *available at* http://www.federalreserve.gov/newsevents/speech/kroszner20080507a.htm (discussing increase in vacant homes due to lenders inability to "handle large REO inventories").

[14] *See* Steven L. Good & Celeste M. Hammond, *Real Estate Auctions—Legal Concerns for an Increasingly Preferred Method of Selling Real Property*, 40 REAL PROP. PROB. & TR. J. 765, 767 (2006) (stating amount of real estate auction sales in 1999 at $49.5 billion); Amy Cortese, *Commercial Auctions Expected to Rise*, N.Y. TIMES, Feb. 22, 2009, *available at* http://www.nytimes.com/2009/02/22/realestate/commercial/22sqft.html?_r=1&pagewanted=print (citing report by National Auctioneers Association tallying auction-generated sales at $58.6 billion in 2008).

I think there is an expectation and assumption by potential buyers that there will be little or no competition. So, they are laying back and not stepping up to buy and control leases.[15] It's an extraordinary buying opportunity right now for those key players, but they are holding tight and retrenching.

I also think that, in the near term, the situation will not improve. Consumers are just going to sit tight, wait and hope to feel more comfortable about where they are. As a result, the home building sector is probably in the fifth or sixth inning of a nine-inning game. On the retail side, the retailers are more likely in the second or third inning and it's getting rougher along the way.

Just based on the last week alone, we've looked at probably 30 different scenarios with private equity funds and other companies that involve attempts to keep companies with thousands of leases out of bankruptcy. They realize that once they go in to bankruptcy the likelihood is they're going to liquidate. So, our entire focus on their behalf, in order to save these companies from bankruptcy, is to work on out-of-court lease restructurings with the landlords. Remaining out of bankruptcy court mitigates the problems mentioned earlier relating to the inability to ether get DIP financing or exit financing.

Out-of-court lease restructuring is big right now, and will grow. I think landlords are facing that reality. Every company, healthy or unhealthy, will try to do what's possible to reduce costs and stave off bankruptcy. If retailers and their owner-investors can't figure out a way to boost sales and fix balance sheets—and to somehow work out some of this debt—there are going to be solvency issues that will just have to play themselves out and allow the market [to] correct itself. That's certain to create stress on all sides.

Williams: I hear that. That was a very persuasive comment. We'd like to go ahead and open up for any questions that the audience may have.

Question: Given the scenario that you've laid out and given the unlikelihood of a company that goes into bankruptcy coming out of it whole, what are some of the things that you are recommending to clients that they do to not only stay out of bankruptcy, but to kind of turn themselves around in an efficacious way?

Roof: Thank you. That's a great question. I think that you're going to find more and more companies trying to figure out a way to stay out of bankruptcy, which is not what Congress intended, I think, when they passed the Bankruptcy Code in an effort to help companies reorganize and rehabilitate themselves.

I think some of the actions that we are taking is first of all—we're helping companies understand that they have to live on what they currently have. And by that I mean they've got to have a good, solid cash forecast. And understand that this is all there is for a while, how can we make it last.

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[15] *See, e.g.*, Cortese, *supra* note 14 ("Circuit City, which filed for Chapter 11 bankruptcy protection . . . tried to auction its store leases but canceled that sale because of a lack of bidders.").

I think good and early communications with lenders, so that bad surprises are avoided. We're encouraging companies to be in dialogue long before they actually trip a covenant or go into a default on debt so that hopefully if there is a productive dialogue to be established, it's established sooner rather than later.

And then we work with companies to make sure that all of the available cost reductions that can be made are done so, but are done so in a way where the company's brand value is protected.

I think that in the case of suppliers, we are urging suppliers to stay on top of their accounts and to make sure that they're getting paid on a timely basis, or even seeking additional credit protections, you know letters of credit, payments in advance, things like that so that in the event that there is a bankruptcy filing, then the unsecured creditor has protected himself as much as he can.[16]

And if I can just add one more thing, I may be belaboring this way past the intent of the original question, but the banks in many cases don't want the keys, because the highest value to be recovered a lot of times is going ahead and building out your subdivisions rather than leaving homes half finished or partly framed or something like that. And the banks simply do not have those kinds of management capabilities internally. When you add that on to the fact that—and this varies state by state—but many of the trade suppliers to homebuilders are in a position to have liens on the work that they perform until they're paid for it.

Often times they're going to be on equal footing or ahead of the banks in terms of priority anyway. And so if you can point all these things out to a reasonable lender, often times they understand that there's better value by trying to work with the situation rather than accepting the keys.

Williams: I think we could take a couple more questions

Question: My question relates to retail in a commercial property leases of—because there is such a dearth of demands for the leases once they are rolled over in bankruptcy—are landlords becoming substantially more amenable to taking big haircuts on the lease payments than they used to be? And if so, approximately what percentage rate are they willing to accept?

Apter: I'll take a stab at that one. It's hard to quantify, just because real estate inherently is an individualized asset. As a result, particularly in this market, there's going to be a flight to quality. We've had extraordinary expansion. We've got a-quality, b-quality, c, d, and f quality real estate all over the place. So, whether or

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[16] *See* Josef S. Athanas & Caroline A. Reckler, *Lock-Up Agreements—Valuable Tool or Violation of the Bankruptcy Code?*, 15 NORTON J. BANKR. L. & PRAC. 4, Art. 4 (Aug. 2006) (describing ability of trade creditors to "require letters of credit or other security before continuing to ship"); *Business Workouts Manual* § 16:38 (Matthew W. Kavanaugh et al., eds., West 2d ed. 2008) (discussing supplier's ability to require cash payments from debtor before providing services and supplies).

not a landlord is going to contribute in a rent relief program, and to what extent, depends on a number of factors.

First, it is dependent upon the quality of real estate. Next, it is dependent upon the debt that may exist on that piece of real estate. Further, it is dependent upon the landlord's financial circumstances and whether or not participation in rent relief will place the property in jeopardy with the lender. The landlord simply may not be able to cooperate because the alternative is to give the keys back to the lender. Finally, if there is a recent probable buyer for the property, the landlord may be somewhat cavalier and, therefore, reluctant to cooperate in lease restructuring.

Hilco Real Estate just completed work on the portfolios of Boscov's, Mervyn's and several other large retailers. We were amazed at the diverse position of the landlords. On the surface, there seemed to be little rationality. What we did find, however, is that a show of competence in negotiating and then presentation of a clear business plan on a go forward basis, particularly in bankruptcy, will foster far more cooperation from landlords, particularly those with smaller properties where the potential for rejection of a lease will have a more significant, direct impact to the asset. The larger REITs, for example, may be less cooperative with a one-off or a two-off negotiation because it will have relatively little impact on what happens for cash flow or occupancy purposes. On the other hand, if you are Circuit City's landlord and you have more than 50 locations, that'll get your attention. On Mervyn's, alone, we had four landlords that owned probably eight million square feet of that portfolio, and rest assured, we had their attention when conversations began. They have to do things in their best interest, and we have to do things on behalf of the debtors' best interest. But ultimately, it's important for them to listen and cooperate because their earnings and asset values are directly affected.

Williams: Thank you. Any other questions?

Question: I'd like to ask Greg Apter—as far as I know, I thought that normally bankruptcies are kind of normally stalled from the November to January period.[17] But it doesn't seem like there's been a slowdown at all there this year. And I just wanted you to kind of comment on that and then expand on your comment that maybe the level of bankruptcies you expect to continue in 2009 and store closings.

Apter: The reason why bankruptcies have increased in the last quarter has less to do with the real estate and more to do with the inventory. At this time of the year, with the typical shopping cycles out there, banks assess their risks, see their covenants being violated, and are concerned about the value of their collateral. They say to retailers, that's it! By end of September or beginning of October, the lender wants a process in place to start liquidating stores because the return on

[17] *Cf. Bankruptcy Statistics*, *available at* http://www.uscourts.gov/bnkrpctystats/statistics.htm#quarterly (last visited March 4, 2009) (providing statistics of quarterly bankruptcy filings from 1995–2001, which shows slight slowdown in bankruptcy filings during fourth quarter).

inventory and their other collateral is going to be higher for the last couple months of the year, in fact dramatically higher than it might be for the first quarter of the new year.

This scenario is exacerbated when sales are as subpar in December as they were in November. And, so, companies cannot even get through the holiday period. They have to file, again because time time/value relationship of the collateral deteriorates drastically as the holiday period wanes.

I have one other observation that may be of interest. In my recent travels, I have run into private equity folks I know and have been told they are buying debt, whether it's the debt of companies they own or companies in which they are interested in investing. They are buying senior secured debt at a substantial discount.

I ran into a scenario just yesterday where a sponsor has purchased just the senior debt of a company at twenty-five cents on the dollar. And it's a company they own. However, they know or at least expect that the company will ultimately file bankruptcy, but based on the liquidation value of the assets, they are comfortable with being an owner of the equity as the debt they bought converts over in a bankruptcy filing.

So, certain of the bankruptcies that I think are coming may wind up as companies that are liable to emerge. This could be a very common structure that we see on a go-forward basis.

Question: OK. And what do you think, though, compared to this year how are so many of the numbers of bankruptcies we're going to see in the coming year?

Apter: I'm going to use Becky's crystal ball caveat and take it to an extreme here. I certainly have some pretty significant fears that if sales do not recover to a more manageable level, and given the inability of companies to meet debt service, there could be a pretty large number of bankruptcies coming. It's certainly hard to quantify, but it could be significant.

Question: I just wanted somebody too to maybe quickly connect the dots for me between consumer confidence and the impact on retail real estate.

Williams: Well Becky you mentioned that earlier on, could you help field that question?

Roof: Yes. I think it's a great question, and I think that when you remember that for consumers, their single biggest asset and their feeling of financial comfort comes from their home. And when they're either concerned about continuing in their home—one in ten homes right now is in some kind of distress with either a missed mortgage payment—more than 30 days past due, or in foreclosure. So when

I think about which of my nine neighbors is it, because hopefully it's not me, it's a staggering statistic that one in ten homes is in some kind of distress.

When consumers don't feel like they have security or equity in their home, they do not spend in other areas, and that just has an enormous trickledown effect. It affects what people buy, how much they're willing to pay for what they buy, how much they eat out, what kind of car they're willing to drive for a year or two longer—it's just a giant circle effect.

And I think that that's what we're seeing in retail. I know that some store sales were down significantly over the Black Friday and the Thanksgiving holiday. But I have to believe that the reason it wasn't down more is because a lot of buying was driven by heavy discounting. And so it makes me wonder what the profit margins are going to be when they're reported.

Williams: I think we have one more question.

Question: My question is for Rebecca to follow up on a point that you made about some of the challenges that face homebuilders trying to make it through the chapter 11 process. Given those challenges and kind of their difficulties using their cash and then selling off their homes—are they going to be able to wait out the next two to three years that you think it will take until that market improves? Or what do you see happening next year?

Roof: I think that many of the homebuilders will be able to wait it out, particularly if they are able to negotiate forbearances with their lenders and their bondholders. There are, however, particularly the smaller homebuilders who will not be able to. And those homebuilders, unfortunately, I think a lot of them will liquidate. They will go out of business.

To some of the points that were made earlier—I could be wrong on this, but I don't know of a homebuilder who has entered chapter 11 and emerged yet. There are some large ones that have a chance of doing it, but it's a positive statistic so far. I think that there will be a lot of opportunities for developers who have cash to pick up very, very good land deals over the next year or two to where I think that those that do make it through, or those that can take advantage of those opportunities, are going to come away with some very, very cheap properties and make a lot of money in the next boom. And there will be another boom.

Williams: As the ABI's resident scholar, let me thank our panelists, Becky and Greg, for an excellent and informative discussion on financial distress in the real estate sector. It was such a wonderful opportunity to hear from well-recognized national experts on the number of problems and difficulties the real estate sector is facing and will face in the future.

With that, I'd like to say good-bye to everyone and sign off. Thank you again.