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PAYLESS FILES FOR CHAPTER 11 BANKRUPTCY

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Payless ShoeSource Inc. filed a Chapter 11 bankruptcy petition (for a second time) on Monday, February 18, 2019 in the United States Bankruptcy Court for the Eastern District of Missouri.

Payless has announced that it plans to close all of its stores in the U.S. and Canada (approximately 2,500 stores total).

The Payless bankruptcy filing comes amid a broader decline in U.S. retail sales. According to the Commerce Department, retail sales dropped by the highest amount in more than nine years in December 2018. The decline was the largest since September 2009, when the economy was emerging from recession.

The rights of the parties to a non-residential real property lease in a bankruptcy case are governed by section 365 of the Bankruptcy Code. Highlights of section 365 when the debtor is the tenant in a Chapter 11 case include the following provisions:

- If a debtor is in default under a lease, the debtor must cure (or provide adequate assurance that it will promptly cure) such default in order to assume the lease;
- The debtor must compensate (or provide adequate assurance of such compensation) the landlord for any pecuniary loss associated with the default (including unpaid rent);
- The debtor must provide adequate assurance of future performance under such contract or lease;
- Landlords are entitled to all post-petition rent when it is due, even before the debtor has decided whether it will assume or reject the lease;
- A debtor-tenant may assign the lease, providing that the debtor first assumes the lease and the new tenant gives "adequate assurance of performance." The party acquiring the assigned lease must provide proof of its ability to pay rent and that the percentage rent due under the lease will not decline substantially. Further, the assignment of the lease cannot result in a breach of radius, location, use or exclusivity provisions in the lease, nor can the assignment disrupt the current tenant mix.
- Tenants are permitted to assume or reject an unexpired non-residential lease until 120 days after the bankruptcy filing (or plan confirmation, if that occurs earlier). This time frame may be extended by the court for 90 days for cause. Further extensions are permitted only with the written consent of the lessor. Leases that have terminated pre-petition cannot be assumed.

Dilworth Paxson's bankruptcy attorneys have significant experience in addressing the rights of the parties to real property leases in bankruptcy cases. If you have any questions on a landlord or



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tenant's rights in bankruptcy, please contact [Peter Hughes](#), [James Matour](#) or a member of our [bankruptcy & insolvency group](#).