CORPORATE

Private Label Agreements

By Joseph V. Cuomo and Allison W. Rosenzweig

In challenging financial times, it is important for manufacturers to consider profitable business alternatives. One such alternative is entering into a private label agreement. Under a private label agreement, products are manufactured by one company but sold under the name or brand of another company, often a retailer or a wholesaler. The resulting private label products are often referred to as "store brands," as opposed to "name brands," which are the products sold under the name of the manufacturer. This arrangement happens in a wide variety of products, but is most common in grocery stores and drug stores.

This article will cover some factors to determine if a private label arrangement is the right business move; reasons for a manufacturer to consider entering into a private label agreement; and considerations that a manufacturer should think through and discuss with its lawyer when negotiating the contract.

Is a private label arrangement the right move?

There are several factors that help determine whether a private label deal is the right move for a manufacturer, some of which include: sales potential of the product, the manufacturing process, and quality.


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A manufacturer that produces products with significant sales potential that satisfy a mass market is usually the most successful in a private labeling arrangement. Retailers are not interested in branding low-demand items. When a manufacturer's name brand product has been pre-tested and retailers and consumers are already familiar with it, the product should be desirable in a private label arrangement, as it can now be sold in a new package because it will self-sell.

Another key factor in determining if private labeling is the right business move is the manufacturing process. It is important to consider whether the manufacturer has the ability to produce a substantial amount of the product, be reliable and ensure on-time delivery. An additional aspect of the manufacturing process is the manufacturer's flexibility and ability to increase production in order to meet demand. The ability to meet a retailer's needs plays favorably in this type of arrangement.

Finally, it is often important to ensure that the private label product is of high quality. Consumer perceptions about private label products have increased significantly in the last few years. Consumers reaching for store brands are no longer just looking for value. They also expect a store name product to have equal or greater quality to brand name products. The quality includes both the product itself, as well as the appearance of the product. It is important to capitalize on this now favorable consumer perspective and factor it into the product and label development process.

Reasons for manufacturers to enter into a private label agreement

During the recent economic recession, private label arrangements became more common for manufacturers. Now the trend seems to be here to stay, and has resulted in an explosion of sales of private label brands. It has become a valued strategy by manufacturers of any size, especially those that have established recognized name brands of their own. Even small and medium-sized manufacturers have new opportunities using private labeling because these companies may gain additional market share and no longer have to compete directly with large manufacturers. Now manufacturers of any size can grow their business by marketing their products to retailers.

Entering into this type of business arrangement allows the manufacturer's product to reach a larger audience. It also allows the product to have more credibility because it bears the label of a store that already has a brand identity of its own. Retailers may be interested in this business strategy as a way to introduce new product lines or source products from specialized manufacturers because it is a more economical alternative to establishing their own production and manufacturing facility.

One major benefit for a manufacturer in a private label arrangement is that it does not have to incur advertising expenses to promote the products.

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CONSUMER BANKRUPTCY

Can Debtors Enter Chap 7 Through the Back Door?

Means test may not be required for conversions

By Craig D. Robins

Some debtors seeking Chapter 7 relief whose incomes are above the state median are unable to do so because they do not pass the means test. So imagine the excitement experienced by the consumer bankruptcy counsel who thinks they discovered a backdoor into Chapter 7 where they do not have to have their clients qualify under the means test.

Ever since Congress imposed a means test requirement on debtors seeking Chapter 7 relief, consumer bankruptcy practitioners have been analyzing the statute, trying to find a way around it.

For years, counsel across the country believed they discovered a loophole. Due to a possible ambiguity in the way Bankruptcy Code section 707(b) was drafted, it appears that if a debtor in a Chapter 13 case voluntarily converts it to one under Chapter 7, the means test is no longer necessary. In other words, debtors can obtain Chapter 7 relief even if they do not pass the means test.

Bankruptcy Code section 707(b) requires debtors seeking Chapter 7 relief to file the means test and pass it. The ambiguity is that this statutory provision states that the means test must be "filed by an individual debtor *under this chapter*." Thus, some counsel have argued that if the debtor did not initiate the case in Chapter 7, the debtor is not legally required to file the means test.


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This was a hot topic discussed at a great many seminars and workshops, including some here on Long Island. However, local counsel could only shrug their shoulders as there has been a dearth of case law in the district and judges have been tightlipped discussing their opinions on the issue.

It seems that over a decade after BAPCPA has gone into effect, there is no definitive guidance for practitioners in New York. Apparently, courts addressing this issue have adopted one of three approaches, either permitting it, rejecting it, or providing for a hybrid approach. Yet, there seems to be no case law in the entire Second Circuit.

The judge in a recent Colorado case found this to be an issue of first impression in that district and discussed the three approaches. *In re: Burgher* (N.D. Colorado; Case No. 12-14410-sbb, September 30, 2015). In this case, the debtors sought conversion from Chapter 13 to Chapter 7 after two years, during which time the Chapter 13 trustee used their plan payments to totally satisfy all mortgage, car loan and income tax arrears. After converting, the U.S. trustee argued that the debtors had sufficient funds to pay their unsecured debts.

The judge agreed and dismissed the case because the debtors conceded that they could not pass the means test if they had to file it. The judge determined that section 707(b) applies to converted cases and that Chapter 13 debtors converting their cases to Chapter 7 had to file and pass the means test.

Judge Sidney B. Brooks began his analysis by reminding us that BAPCPA was enacted to restrict eligibility for relief under Chapter 7 by making it harder for individuals who can repay their debts to file for bankruptcy under Chapter 7. He then discussed the three approaches regarding the application of section 707(b) to converted cases. Nationwide, three distinct approaches have developed. Judge Brooks says that an overwhelming majority of courts have decided that applying section 707(b) to cases converted to Chapter 7 is in accord with the overarching goals of BAPCPA.

Under the majority approach, courts have taken the view that when a case is converted to Chapter 7, the case is deemed filed under Chapter 7 as of the initial petition date, and therefore, subject to a full section 707(b) analysis for purposes of eligibility. In addition, different courts also rely on different supplementary rationales to support their conclusions.

Bankruptcy courts adopting the majority approach include the Eighth Circuit, Rhode Island, the Eastern District of Virginia, the Western District of Missouri, Oregon, the Western District of Virginia, and the Southern District of Georgia.

Meanwhile, a minority of courts utilizes a "literalist view," and has found

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Name brand products tend to cost more than their generic store-brand counterparts. That is mostly because branded products carry all of the costs of promotion, but private label products carry no such costs. Instead, the retailer becomes responsible for advertising and marketing.

Further, manufacturers and retailers are providing a combination of price and value to the consumer. When a store brand product and a brand name product come out of the same manufacturing plant, they are often the same item with different labels. The result is that consumers that switch to store brands save money, because the price does not include the manufacturer's advertising and marketing costs, and also do not have to sacrifice quality.

Factors to consider when negotiating a private label agreement

There are several factors to consider when negotiating a private label agreement. In addition to the considerations provided below, each industry may have specific issues that need to be included in the agreement. It is essential for a manufacturer to have discussions with its lawyer as to its specific needs in order to ensure that the agreement accurately covers all of the necessary elements of the deal.

Exclusivity is an extremely important issue to consider during the negotiation process. If the agreement states that the retailer has the exclusive retail rights and/or private label rights to a manufacturer's product, the manufacturer may be preventing itself from selling the products under its brand name and/or selling store brand products to other retailers. Exclusivity to a specific territory may prevent the manufacturer from selling products directly in that location. The manufacturer should look to be free to continue to sell product under its own brand and to other private label retailers, if possible. It is recommended that a manufacturer should not allow any one retailer to account for more than 15 percent of its sales. It may even be included in the contract that the name brand product and the store brand product have different images and consumer perceptions in order to reduce direct competition between the brands. The manufacturer will also want to avoid or limit giving its private label retailer "first refusal" rights on future manufacturer products.

During the negotiation of the agreement, the lawyer should discuss minimum order requirements for the private label product. The volume commitment establishes the minimum amount of the product the retailer must order within a specified time period. Additionally, the lawyer should discuss the amount of packaging that the manufacturer must keep in stock. Manufacturers will want to keep the minimum order amount high, and the stock requirement amount low. If possible, the manufacturer should negotiate to include a clause in the agreement that states the retailer will reimburse it for any unused packaging.

Intellectual property should be protected in a private label agreement. The manufacturer must retain all of its intellectual property rights, including trademarks, trade dress, service marks, patents, and copyrights, in its company, products and all related materials. The retailer will want to retain its store brand intellectual property.

Parties to a private label agreement may exchange confidential information and, therefore, should protect that information by including a confidentiality clause in the agreement. This clause may cover product costs, company overhead costs, recipes or product development plans, distribution plans, and other proprietary information. The manufacturer should restrict the sharing of its confidential information to the greatest extent possible. Additionally, the manufacturer may want the retailer to be prohibited from disclosing the terms of the agreement and even the private label relationship with the manufacturer.

Additional provisions that may be discussed during the negotiation and drafting stages of the private label agreement include quality control, term of the agreement, order procedure, pricing, billing and payment methods, delivery, labeling obligations, warranties, limitations on damages, insurance and indemnification obligations.

The manufacturer should avoid giving the retailer any "most favored nation" rights as to pricing or other business terms. Such rights are often hard for the manufacturer to manage and comply with, and could prove devastating down the road.

As the retailer is often a competitor or potential competitor of the manufacturer, anti-trust laws should always be considered, especially in the area of pricing.

Manufacturers are increasingly more attracted to private labeling. Many manufacturers have even created a specific private-label division within the company to take advantage of the company's excess manufacturing abilities. The manufacturer may have a well-known brand of its own, but may choose to sell a portion of its production under a private label. As the trend continues to gain popularity, companies should consider expanding their business to include a private label strategy.

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that the plain language of the statute provides that only cases initially *filed* as Chapter 7 petitions are subject to the scrutiny of section 707(b). These courts have held that the inquiry at issue begins and ends with the language of the statute and what it does and does not say.

Courts adopting the minority view include the Middle District of Florida, New Jersey, the Western District of Virginia, the Southern District of Texas, and the Western District of Arkansas.

A small number of courts have resorted to a third, hybrid approach, which like the minority "literalist view" also relies on a plain reading of the statute, but concludes that the statute applies to cases converted to Chapter 7.

If you find yourself with a client in a failing Chapter 13 case, but are worried that the debtor will not pass the means test, consider filing anyway, but be prepared to defend your position if the U.S. Trustee raises the issue, and also be prepared that the conversion might not be ultimately successful.

In addition, Counsel should support the conversion with an affidavit from the debtor, explaining the change in circumstances that justifies conversion to Chapter 7. Of course, if the debtor passes the means test at the time of conversion, then counsel should simply file an amended means test and there should be no issue.

Also be mindful that if you seek a backdoor entry into Chapter 7 in a preplanned manner, it will be evident that your position is disingenuous and lacks good faith, which will likely end up backfiring.

If your author was a betting man, he would wager that the judges in our district, who have shown a preference for statutory interpretations supported by a logical rather than literal analysis, would adopt the majority approach.

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Elder Law Attorney (Continued from page 13)

John and Diane had taken a mortgage for half of the value of the property. As such, one-half of the value of the property was transferred for consideration. As it stood, however, John and Diane would need to pay the nursing home approximately $480,000 ($12,000/month) due to the 40 month penalty period. Had John and Diane retained an Elder Law attorney, this costly mistake would not have happened.

While some of these mistakes can be successfully appealed, it comes at great cost to the client — both financially and emotionally. Had these clients retained an Elder Law attorney *ab initio*, these costly outcomes could have been avoided.

These are but two examples relating to real property. Elder Law practitioners come up against many issues that are specific to our area of practice, such as Promissory Note planning to protect assets upon or even after nursing home admission, Undue Hardship applications to reverse a penalty period that resulted from action taken by someone other than the applicant, applications and hearings to prove that an asset transfer was a gift made for a purpose other than to qualify for Medicaid benefits, and more. Elder Law attorneys can provide the legal advice necessary to handle all such cases properly from the beginning, saving the client time, money and much unnecessary angst.

Note: Melissa Negrin-Wiener is a partner at the Elder Law firm Genser Dubow Genser & Cona in Melville. She is the President of the Suffolk County Women's Bar Association and is an Advanced Elder Law Mediator. For more information, go to www.genserlaw.com.

[1] Names have been changed for confidentiality.
[2] N.Y. Soc. Serv. Law § 366(5)(d)(3)(i); 18 N.Y.C.R.R. § 360-4.4(c)(2)(iii)(b).
[3] Names have been changed for confidentiality.