

# insolvency2020



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## National Conference of Bankruptcy Judges: Restructuring in the Wake of Coronavirus

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Hon. David R. Jones; U.S. Bankruptcy Court (S.D. Tex.)

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## Educational Materials



# Financial Statements

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## Navigating Restructuring Considerations and Managing Distress Amid COVID-19



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**Editor's Note:** To stay up to date on the COVID-19 pandemic, be sure to bookmark ABI's Coronavirus Resources for Bankruptcy Professionals website ([abi.org/covid19](http://abi.org/covid19)).

COVID-19 brought the world's economy to a near halt in the first quarter of 2020 through widespread furloughs, store closures and stay-at-home orders, and most companies were understandably unprepared for such an unanticipated event. Although the 2008 financial crisis might provide some level of background and guidance for businesses navigating the months ahead, the current economic fallout carries certain factors that were not present in 2008. Chief among those factors is that the current economic fallout was caused by a highly contagious virus, which has severely constrained any type of in-person contact and caused most businesses to operate remotely. Even when it is safe for all companies to return to business in the ordinary course, the post-pandemic business world might be very different from historical ordinary-course practices.

Despite the economy slowly opening up, companies across all industries are anticipating a surge in financial restructurings, foreclosures and bankruptcy filings as a result of the current pandemic and resulting economic recession. Notwithstanding, companies can take certain steps to maximize their chances of successfully weathering the storm, whether that includes new financing, a formal chapter 11 filing, an out-of-court workout or otherwise. This article examines certain steps that companies can employ while navigating uncertain waters in a post-COVID-19 world.

### Board Advice/Advisors

The priority of boards and management should be the maximization and preservation of value for all stakeholders while protecting people's health and safety amid the chaos caused by COVID-19. Effectively managing this crisis requires fast and decisive actions; however, the effects of and responses to the coronavirus pandemic are changing daily, and analysts and experts have not yet reached a consensus regarding when and how companies can return to regular business opera-

tions. For this reason, companies should assemble the right team of advisors to work collaboratively with boards and management to develop, analyze and execute the most viable path to ensure the company's health and survival. Companies need to stay nimble, and having a team of dealmakers with restructuring experience will help a company minimize the risk of collapse.

In addition, directors and officers of financially troubled companies will likely have to make difficult decisions, and they must be deliberate about where they focus their attention in this rapidly evolving situation. Because companies will have to balance short-term measures taken to address new issues with long-term strategic priorities, directors and officers should maintain thorough records of a diligent and well-informed decision-making process. Among other things, companies' management teams should engage in regular communications with the board to assess and address issues as they arise.

But while increased regular board meetings might be the right option for some companies, they might not be practical for others that have management teams experiencing extreme pressure in handling the day-to-day issues caused by COVID-19. A company might also opt to develop a strategic crisis-management plan to guide its response, and provide its board with reports of major issues management is addressing, weekly financial information, etc. In any event, management and boards should carefully monitor operations and liquidity to ensure that they are complying with applicable fiduciary duties and taking the rights steps to preserve value for stakeholders.

Directors and officers will be presented with decisions and opportunities to take or abstain from taking certain actions, such as approving certain payments, strategic alternatives, new business strategies or other transactions. The failure to take a particular action could be challenged (with the benefit of hindsight) as a breach of fiduciary duties should the company subsequently falter or stakeholders perceive that the company's decisions harmed them. As a general matter, directors and officers will have fulfilled these duties if they act in an informed manner, with requisite care and in the best interests of the company and its stakeholders as a whole, and exercise disinterested and independent judgment. If

directors and officers satisfy the duties of care and loyalty, they are afforded the protection of the “business judgment rule,” which is highly deferential to and protective of directors and officers.

The financial success of a company often depends on the company’s leadership. Accordingly, directors, officers and advisors should work collaboratively to find the solution and process that best fits a particular situation and mitigates risk.

## Financing/Liquidity Management

Although the long-term economic effects of COVID-19 are unknown, few companies will be spared from having to address some type of liquidity shortfall. Accordingly, many companies should explore traditional and nontraditional financing sources for relief. Financing might come from a company’s current capital structure (*e.g.*, through a draw-down on a revolving credit facility or a refinancing), third-party lenders, non-traditional sources (*e.g.*, private credit), or government relief or stimulus packages (if available and if the company qualifies). In addition, because the pandemic caused many business operations to slow down significantly — if not altogether — companies should monitor their financial and other covenants in their debt documents to make sure that they are not at risk of entering an event of default on their debt.

Companies should work with their advisors to analyze their liquidity runway and financial forecasts in order to determine whether the company will need (1) to negotiate a forbearance regarding interest/principal payments with its current lenders; (2) to negotiate an amendment to its current debt documents to replace or waive anticipated or current events of default; and (3) additional financing (and if so, how much and on what timeline is it needed, and what are the available sources).

Traditional lenders might be apprehensive in extending credit or negotiating an amendment or forbearance, at least on what was historically market terms, until there is more certainty with regard to the length and effect of the current pandemic. For example, since the onset of COVID-19, the authors have seen an uptick in borrowers drawing down on their revolving credit facilities, not only because borrowers are looking to bolster their liquidity, but also because borrowers worry that current market conditions may result in events of default materializing under their credit agreements that would prevent them from borrowing in the future. While lenders and borrowers worked cooperatively for the most part during the early weeks of the economic crisis, lenders will likely take more conservative positions with borrowers as the market gains clarity with respect to industry winners and losers.

With companies of all sizes and from all industries looking to address the external disruption caused by COVID-19 and the general turmoil in the debt markets it caused, traditional financing sources are not as readily available. Advisors can assist companies with analyzing potential nontraditional lending sources, including private credit and government-funding sources, to determine what other options might be available. Private-debt firms are in a position to lend,<sup>1</sup> and they may see an opportunity to step up and lend where other financing sources have pulled back.

In addition, as governments continue to respond to the COVID-19 pandemic, so do the available relief packages and eligibility requirements. Companies should work with their advisors to evaluate all available options to address short-term liquidity concerns and mitigate risks while managing long-term exposure.

Taking measures to improve liquidity positions and stay solvent will require a tailored approach that likely involves taking several proactive measures. For example, on April 16, 2020, Nordstrom Inc. announced that it was taking “precautionary measures to strengthen its financial position for the long term” in response to the uncertainty related to the pandemic. These actions included entering into an amendment with its asset-based loan (ABL) lenders and raising \$600 million through issuing secured notes.<sup>2</sup> The ABL amendment, among other things, provides that Nordstrom’s obligations are unsecured except during a defined “collateral period” (based on the company’s leverage ratio or unsecured debt rating), during which time the obligations are secured primarily by the company’s inventory. The newly issued notes, which mature on May 15, 2025, are secured by Nordstrom’s ownership interest in a separate entity that holds its real estate interests. Nordstrom also drew down \$800 million on its ABL facility, suspended quarterly cash dividends and share repurchases, and reduced operating expenses and capital expenditures by \$500 million.

## Negotiations with Creditors and Other Parties

In addition to lenders, companies should consider their relationships with (and obligations to) other parties. Given reduced operations, companies might be unable to satisfy obligations to third parties, or might no longer need the goods or services for which they originally contracted. Companies should consider what relationships they want to prioritize and preserve in the long term, and how their adapted operations going forward could affect those relationships. Companies should look for cost-saving opportunities by reviewing their options to shed unnecessary contracts or negotiate better pricing or terms. In doing so, companies should also determine what leverage they have — either contractually or by virtue of the economic climate — to maximize value and minimize losses.

Businesses might also experience issues with their own vendors, suppliers and customers who might also be experiencing financial distress and wanting to terminate agreements or relationships as a result. An unexpected halt or reduction in business operations, and thus a slowdown of revenue, can result in parties wanting to get out of contracts (*e.g.*, vendors unable to supply goods or customers looking to terminate agreements).

Companies should work with their advisors to determine how to preserve material relationships, what leverage exists to enforce contracts and the practicality of such enforcement, and how to identify new supply chains, service providers or

<sup>1</sup> As of March 2020, private-debt funds held approximately \$271 billion in capital, according to data from Preqin. See Laura Kreutzer & Laura Cooper, “Private Credit Weighs Risks and Opportunities in Market Turmoil,” *Wall St. J.* (March 17, 2020), available at [wsj.com/articles/private-credit-weighs-risks-and-opportunities-in-market-turmoil-11584442800](https://www.wsj.com/articles/private-credit-weighs-risks-and-opportunities-in-market-turmoil-11584442800) (last visited June 15, 2020).

<sup>2</sup> Nordstrom Inc. Current Report (Form 8-K) (April 16, 2020).

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customers. Given the current global economic strain, many landlords, vendors and customers might be willing to make concessions that they might not otherwise have considered. Companies should be prepared to use any and all tools at their disposal while seeking to maximize the value of the company for all stakeholders.

### Contingency Planning

Given the difficult environment in which companies are operating, the uncertainty regarding when the economy and operations will normalize, and what this “new normal” might look like, companies should work with their advisors to develop and review potential options to help the company stabilize (if necessary) and not succumb to the economic pressures felt worldwide.

The authors have noticed that many of their clients have successfully implemented a “carrot and stick” approach while developing go-forward options, which have included altering business plans (*e.g.*, to better fit current economic activity or address supply chain/logistical changes), negotiating with lenders, potential lenders or other parties, analyzing other ways to cut costs, or preparing for a formal in-court restructuring.

Companies should be cognizant of what options might be temporarily unavailable or not feasible, given the current situation. For example, companies have not been able to use liquidation sales, a common cost-saving and loss-mitigating action, during the pandemic. The inability to hold sales and auctions resulted in Art Van Furniture LLC converting its chapter 11 cases to chapter 7, citing “no viable path forward in chapter 11” after social-distancing restrictions stunted store-closing sales.<sup>3</sup> Modell’s Sporting Goods Inc. took a unique approach when it suspended its chapter 11 proceedings, given its inability to conduct liquidation sales, which were the “cornerstone” of its bankruptcy.<sup>4</sup>

<sup>3</sup> *In re Art Van Furniture LLC*, No. 20-10553 (CSS) (Bankr. D. Del.).

<sup>4</sup> *In re Modell’s Sporting Goods Inc.*, No. 20-14179 (VFP) (Bankr. D.N.J.).

In addition, companies should be careful to avoid taking any action that would terminate a potentially desirable transaction, financing or other option. For example, as government response continues to emerge and evolve, there might be eligibility restrictions that would prevent otherwise-qualifying companies from taking advantage of much-needed liquidity or other relief. Once a company and its advisors develop various alternatives, they should review which option(s) preserve the most value for stakeholders and determine what steps need to be taken and when to preserve optionality. Starting this process early enables companies to best position themselves for future success.

**COVID-19 presents a dynamic situation that all companies are having to address, and the effects of the worldwide economic downturn continue to evolve.**

### Conclusion

COVID-19 presents a dynamic situation that all companies are having to address, and the effects of the worldwide economic downturn continue to evolve. To emerge from this pandemic financially healthy, companies must find ways to take affirmative steps to adapt, and they should not idly proceed with normal business operations without taking pre-emptive or reactive measures to address issues and mitigate risks. COVID-19 will likely alter industry structures, result in different consumer behaviors, lead to new work patterns and distributions, and require adapted business plans and pipelines. Engaging the right advisors to preserve optionality to address issues as they arise is critical to positioning a company to not only survive but thrive in a post-pandemic market. **abi**

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# The International Scene

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## COVID-19: A Catalyst of Modernization Across Jurisdictions

**Editor's Note:** To stay up to date on the COVID-19 pandemic, be sure to bookmark ABI's Coronavirus Resources for Bankruptcy Professionals website ([abi.org/covid19](http://abi.org/covid19)). Mr. Zahralddin-Aravena also leads ABI's COVID-19 Global Economic Response Project ([globalinsolvency.com/covid19](http://globalinsolvency.com/covid19)).

The novel coronavirus disease has altered the way that legal professionals practice law across the globe, as courts in both the common law and civil law traditions<sup>1</sup> have had to modify the administration of law to do their part to enforce health restrictions. Courts closed, then reopened, primarily virtually, as their services are deemed “essential” functions in many jurisdictions.

In some courts, there has been a ban on paper deliveries of any kind due to health concerns.<sup>2</sup> The magnitude of the effects on legal systems around the world and their duration is yet undetermined but merits a close review, as common law jurisdictions (such as the U.S.) and civil law jurisdictions (such as Québec and France) are forced to accelerate the move toward electronic signatures, electronic filings and remote notarizations.<sup>3</sup>

### Pre-COVID-19 Efforts to Modernize the Administration of Justice Global Proliferation of Electronic Transactions

The United Nations Conference on Trade and Development (UNCTAD) reports that 145 countries across the globe have adopted laws to facilitate electronic transactions. It sees such laws as essential, stating that “to have e-transaction laws that recognize the legal equivalence between paper-based and electronic forms of exchange” is a “prerequisite for conducting commercial transactions online.”<sup>4</sup> Eighty-one percent of the world’s nations have such legislation in place, 6 percent have drafted legislation, 4 percent have no legisla-

tion, and the remaining 9 percent have not reported data to UNCTAD.<sup>5</sup>

### Movement Toward Digitized Records, Electronic Filings and e-Signatures

In 1998, the Uniform Law Conference of Canada adopted the Uniform Electronic Commerce Act.<sup>6</sup> It proposed the use of “functional equivalents” to paper in a “technology neutral” way to make the law “media neutral” (*i.e.*, equally applicable to paper-based and electronic communications).<sup>7</sup> Legislation based on these principles was thereafter adopted throughout Canada, including in Québec,<sup>8</sup> and is “generally permissive in relation to the use of [an] e-signature so long as the e-signature technology used is reliable and meets the basic characteristics of an enforceable e-signature.”<sup>9</sup>

The U.S.’s federal law has recognized electronic transactions, including smart contracts and electronic signatures, through the U.S. Electronic Signatures in Global and National Commerce (ESIGN) Act passed in 2000, as well as through the adoption of the Uniform Electronic Transactions Act (UETA) released in 1999.<sup>10</sup> The UETA provides that when a law requires either a writing or a signature, an electronic record or an electronic signature can satisfy that requirement when the parties to the transaction have agreed to proceed electronically.<sup>11</sup> The UETA and ESIGN ensure that electronic records and signatures have the same legal effect as traditional paper documents and wet-ink signatures.<sup>12</sup>

<sup>5</sup> *Id.*

<sup>6</sup> Uniform Law Conference of Canada, Uniform Electronic Commerce Act (Annotated 1999), available at [ulcc.ca/en/1999-winnipeg-mb/359-civil-section-documents/1138-1999-electronic-commerce-act-annotated](http://ulcc.ca/en/1999-winnipeg-mb/359-civil-section-documents/1138-1999-electronic-commerce-act-annotated).

<sup>7</sup> *Id.*

<sup>8</sup> “Act to Establish a Legal Framework for Information Technology,” C.Q.L.R. c C-1.1, available at [legisquebec.gouv.qc.ca/en/ShowDoc/cs/C-1.1](http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/C-1.1) (updated Feb. 1, 2020).

<sup>9</sup> Tracy Springer & Kiriakoula Hatzikirakos, “What’s Ink Got to Do with It? Enforceability of E-Signature in Commercial Lending Documentation,” *ABA Business Law Today* (April 9, 2020), available at [businesslawtoday.org/2020/04/whats-ink-got-enforceability-e-signature-commercial-lending-documentation](http://businesslawtoday.org/2020/04/whats-ink-got-enforceability-e-signature-commercial-lending-documentation).

<sup>10</sup> Electronic Transactions Act, Uniform Law Comm’n, available at [uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034](http://uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034).

<sup>11</sup> *Id.*

<sup>12</sup> Several U.S. states, including Arizona and Tennessee, have also passed measures related to ESIGN and EUTA to encourage the proliferation of electronic transactions. Delaware has passed legislation and initiated a study to use technology to modernize securities and Uniform Commercial Code filings and record maintenance. For an excellent survey of areas where Delaware is positioned to push such innovation forward, see My Say, “Why the Delaware Blockchain Initiative Matters to All Dealmakers,” *Forbes* (Sept. 20, 2017), available at [forbes.com/sites/groupthink/2017/09/20/why-the-delaware-blockchain-initiative-matters-to-all-dealmakers/#ab9b8fa75508](http://forbes.com/sites/groupthink/2017/09/20/why-the-delaware-blockchain-initiative-matters-to-all-dealmakers/#ab9b8fa75508); Blockchain Consulting LLC, Open Letter to Delaware (Sept. 14, 2017), available at [blockchainconsulting.net/open-letter-to-delaware](http://blockchainconsulting.net/open-letter-to-delaware).

<sup>1</sup> On the various legal traditions of the world in general, see H. Patrick Glenn, *Legal Traditions of the World*, 2d Ed. (Oxford University Press 2004).

<sup>2</sup> For example, by order of March 16, 2020, the Supreme Court of Delaware ordered that as a precautionary measure, lawyers shall not submit any copies of electronically submitted documents. Order (March 16, 2020), available at [courts.delaware.gov/rules/pdf/March162020COVIDPaperFilingsSuspended.pdf](http://courts.delaware.gov/rules/pdf/March162020COVIDPaperFilingsSuspended.pdf) (unless otherwise specified, all links in this article were last visited on May 28, 2020).

<sup>3</sup> The Council of Europe has an informative webpage, “Management of the Judiciary — Compilation of Comments and Comments by Country,” which provides a good survey of measures across Europe; available at [coe.int/en/web/cepej/compilation-comments](http://coe.int/en/web/cepej/compilation-comments).

<sup>4</sup> U.N. Conference on Trade and Development, E-Transactions Legislation Worldwide, available at [unctad.org/en/Pages/DTL/ST1\\_and ICTs/CT4D-Legislation/eCom-Transactions-Laws.aspx](http://unctad.org/en/Pages/DTL/ST1_and ICTs/CT4D-Legislation/eCom-Transactions-Laws.aspx).

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In September 1998, the Judicial Conference of the U.S. adopted electronic record-keeping, opening up access to legal information to the public through the Public Access to Court Electronic Records (PACER).<sup>13</sup> In the late 1990s, federal courts in the U.S. also adopted the electronic case-management system known as the Case Management/Electronic Case Files (CM/ECF), which allowed electronic filings of documents with electronic signatures (in lieu of wet signatures). While the movement toward digitization has not weaned the legal industry away from paper, it modernized the administration of justice in the U.S. and Québec, and created a platform from which their judicial systems can transition into the post-COVID-19 era.

### Electronic Notarizations and Remote Online Notarizations

Pre-COVID-19 modernization efforts did not escape the realm of notarizations. In the U.S., even before the pandemic, a number of states permitted electronic notarizations or e-notarizations, which involve the notarization of electronic signatures on documents in electronic format in the presence of a notary.<sup>14</sup> A number of states also permitted remote notarizations performed through the remote online notarization systems (RONs), whereby the notary and signer appear remotely and use audio/video technology to notarize documents.<sup>15</sup> By the end of 2019, 22 U.S. states allowed RONs, with Virginia being the first state to lead this charge in 2010.<sup>16</sup>

However, prior to COVID-19, similar efforts were not implemented in civil law jurisdictions, likely due to the conceptual and substantive differences between a common law notary and a civil law notary. In common law jurisdictions, such as the U.S. and Great Britain, the notary public is a public officer with a more narrowly defined role centered on the identification of document signers, taking of signers' acknowledgments, and administering oaths and affirmations.<sup>17</sup> Notaries in these systems are not responsible for the accuracy, contents or legality of the underlying documents they notarize.

On the other hand, the civil law notary is subject to ethical standards, with considerable responsibility and discretion in the performance of such legal functions as drafting and

authenticating legal instruments (which conclusively establishes that the instruments themselves are genuine and that what they recite accurately represents what the parties said).<sup>18</sup> An action authenticated by a civil law notary is given great probative value in the civil law system, a legal regime dominated by the need for authenticity of a written record, where notaries are trained in law school and perform tasks similar to those of a solicitor or attorney.<sup>19</sup> The responsibility of a Latin American *Notario Publico* is an excellent example of the gravity of the civil law notary's duties, which extend to the incorporation of every company, buying and selling of real estate, establishment of deeds and wills, and the creation of mortgages.<sup>20</sup> *Notarios Publicos* will "labor over the document and make sure it is in conformance with the law."<sup>21</sup> The Mexican *Notario Publico* has the words "Doy Fe" next to the signature on a document, which translates into "I give faith," as the civil law notary's role is more akin to that of a jurist than a lawyer.<sup>22</sup>

The difference in the degree of formality and evidentiary effect of the notarial act accounts for the relative ease with which certain common law traditions, such as in the U.S., have moved toward the implementation of RONs, even prior to the pandemic. However, it is clear that the pandemic has augmented the pace at which these changes must be made across all traditions, forcing both the civil law and common law jurisdictions to expedite the process of adopting the relevant regulations to modernize the traditional processes now challenged by the stay-at-home orders and social-distancing mandates.

### Acceleration of Modernization Efforts in Light of the Pandemic Measures in the U.S.

In response to the global emergency caused by the outbreak of COVID-19, courts and legal professionals in the U.S. have implemented a number of measures to address the pandemic.<sup>23</sup> Such measures include the use of videoconferencing facilities to conduct remote court hearings, mediations, depositions and other functions that normally require extensive personal contact.<sup>24</sup>

In bankruptcy (and other federal) courts across the U.S., "wet signatures" have been eliminated for most filings under the CM/ECF system; however, the majority of the U.S. bankruptcy courts have now gone a step further by temporarily suspending the requirement to obtain "wet signatures" on documents for which such signatures were

13 See "25 Years Later, PACER, Electronic Filing Continue to Change Courts," *Judiciary News* (Dec. 9, 2013), available at [uscourts.gov/news/2013/12/09/25-years-later-pacer-electronic-filing-continue-change-courts](https://uscourts.gov/news/2013/12/09/25-years-later-pacer-electronic-filing-continue-change-courts).

14 See Michael Lewis, "Remote Notarization: What You Need to Know," *Notary Bulletin* (June 27, 2018), available at [nationalnotary.org/notary-bulletin/blog/2018/06/remote-notarization-what-you-need-to-know](https://nationalnotary.org/notary-bulletin/blog/2018/06/remote-notarization-what-you-need-to-know).

15 Notary performing the notarization services remotely must verify the identity of the signer through knowledge-based authentication (KBA) methods, credential analysis and remote presentation of the identification documents (via a webcam). To start a remote notarization, both the signer and notary must access a RON platform. Documents used must be in an electronic format, such as a PDF. Once the notary verifies the signer's identity and is confident that the signer is willing and mentally competent, the signer and notary both sign the document electronically, and the notary affixes an electronic seal to the same. When finished, the document can be retrieved from the RON platform. In addition to keeping a journal of the remote online notarization, notaries are also required to create an audiovisual recording of each remote notarization. See David Thun, "The State of Remote Online Notarization," *Nat'l Notary Magazine* (November 2019), available at [nationalnotary.org/notary-bulletin/blog/2019/11/the-state-of-remote-online-notarization](https://nationalnotary.org/notary-bulletin/blog/2019/11/the-state-of-remote-online-notarization).

16 Bob Jawarowski, "Remote Online Notarization: More States, Including New Jersey, Join the Crowd," *Holland & Knight Alerts* (April 17, 2020), available at [hklaw.com/en/insights/publications/2020/04/remote-online-notarization-more-states-including-new-jersey](https://hklaw.com/en/insights/publications/2020/04/remote-online-notarization-more-states-including-new-jersey).

17 See generally Pedro A. Malavet, "Counsel for the Situation: The Latin Notary, a Historical and Comparative Model," 19 *Hastings Int'l & Comp. L. Rev.* 389 (Spring 1996).

18 See John Henry Merryman, *The Civil Law Tradition* 113-115 (1969). Civil law notaries are at work in more than 88 countries around the world and are collectively grouped in the International Union of Notaries, "a non-governmental organization that aims to promote, co-ordinate and develop the function and activities of notaries throughout the world." See the Union's mission statement at [uini.org/mission](https://uini.org/mission).

19 J.-F. Sagaut, "The Notary," 4 *Henri Capitant L. Rev.* 130 (2012), available at [henricapitant.org/revue/en/n4](https://henricapitant.org/revue/en/n4).

20 Jonathan A. Pikoff & Charles J. Crimmins, "Lost in Translation: Texas Notary Public v. Mexico Notario Publico," available at [sos.state.tx.us/statdoc/notariopublicoarticle.shtml](https://sos.state.tx.us/statdoc/notariopublicoarticle.shtml).

21 *Id.* (quoting personal interview with Francisco Visoso, *Notario Publico* No. 145 for Mexico City, Feb. 15, 2005).

22 *Id.*

23 See "Global Responses to Limit the Economic Impact of Covid-19 Pandemic," *Global Insolvency*, available at [globalinsolvency.com/covid19/usa](https://globalinsolvency.com/covid19/usa).

24 *Id.*

required, including the debtors' voluntary petitions for bankruptcy relief.<sup>25</sup>

More than 20 other states have adopted emergency legislation allowing remote online notarization.<sup>26</sup> In those states where RON services are permitted (either on a temporary or permanent basis), there might be certain limitations concerning the audio/video platforms used, as well as certifications that notaries must obtain from the states' regulatory authorities.<sup>27</sup>

### Measures in Québec<sup>28</sup>

The modernization of the Québec judiciary system is still at an early stage; however, the pandemic is accelerating it.<sup>29</sup> In 2018, the government of Québec had already announced a plan to modernize the justice system and invest CAD \$500 million between 2018-23, including a sum of CAD \$289 million dedicated to bringing the justice system in line with the latest technology.<sup>30</sup> In addition, since 2016 the newly enacted Code of Civil Procedure (Québec) adopted several provisions to foster the use of appropriate technology.<sup>31</sup>

In Québec, since March 16, 2020, courthouse services have been reduced and hearings limited to urgent matters. On March 26, 2020, a judge of the Superior Court of Trois-Rivières (Québec) presided over Québec's first virtual trial.<sup>32</sup> All Québec Superior Court judges have received special training on videoconference facilities and have formed a judicial IT Committee. The use of technology for all hearings that remain scheduled is favored, including virtual hearings, but lawyers are encouraged to try to amicably settle their cases. The Montréal Commercial Chamber (*i.e.*, the bankruptcy court) was only available for urgent or priority matters by telephone on a case-by-case basis during the pandemic until June 1, 2020, when it somewhat resumed its hearings and added virtual hearings as a possibility.

There is no e-filing system, and new urgent applications must still be filed at the court registry on paper with court fees paid at the registry,<sup>33</sup> but this is about to change in the forthcoming weeks.<sup>34</sup> However, the Digital Office of the Québec Court of Appeal, launched on April 7, 2020, allows lawyers and citizens across Québec to file electronic notices

of appeal in *de plano* appeals in civil matters, and court fees for these filings are payable online.<sup>35</sup> Some matters may be heard by videoconference before the court of appeals.<sup>36</sup>

As previously mentioned, e-signatures in Québec were generally accepted after the adoption of legislation based on the Uniform Electronic Commerce Act,<sup>37</sup> but not for notarial deeds.<sup>38</sup> On March 28, 2020, the government of Québec announced a temporary measure allowing notaries to close notarial deeds remotely.<sup>39</sup> Notarial deeds can be closed remotely if (1) the notary can see and hear each party; (2) all parties and intervenors can see and hear the notary; (3) where the context requires, witnesses can see and hear the parties and the notary; (4) the signatories and the notary can see the act; (5) the signatories other than the notary affix their signature by a technological means that enables their identification and the acknowledgment of their consent; and (6) the notary affixes his/her official digital signature.<sup>40</sup>

A notary must ensure the integrity and confidentiality of the documents shared and the signature process. This notary must also maintain the integrity of the act throughout its life-cycle, including to ensure its preservation.<sup>41</sup> As a side note, similar measures have also been adopted in France.<sup>42</sup>

### Conclusion

The virus has not respected borders, significantly affecting how lawyers provide legal services and courts administer justice in both common law and civil law jurisdictions. Katherine Mangu-Ward, editor-in-chief of *Reason* magazine, recently stated:

COVID-19 will sweep away many of the artificial barriers to moving more of our lives online. Not everything can become virtual, of course. But in many areas of our lives, uptake on genuinely useful online tools has been slowed by powerful legacy players, often working in collaboration with overcautious bureaucrats.<sup>43</sup>

Current changes have occurred on a truncated timeline, accelerating trends that were already underway. As legal systems throughout the world are propelled into the digital age, they will emerge from the current crisis dramatically transformed post-pandemic. **abi**

25 For a list of bankruptcy courts that have adopted such orders and to obtain copies of the orders, see [uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic#bankruptcy](https://uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic#bankruptcy).

26 For notary law updates by state, see [nationalnotary.org/notary-bulletin/blog/2020/03/answers-urgent-questions-notaries-ron](https://nationalnotary.org/notary-bulletin/blog/2020/03/answers-urgent-questions-notaries-ron).

27 *Id.*

28 On Québec's legal traditions, see Antoine Leduc, *Mondialisation et Harmonisation Du Droit Des Sûretés* (Les Éditions Thémis 2012), at 315-20. Québec is a mixed jurisdiction, with its private law system belonging to the civil law tradition and its public law system inspired by the British common law institutions. *Id.*

29 Emmanuelle Gril, "La Justice à Distance: Des Enjeux Pour L'avenir de la Profession Juridique," National | ABC National (April 14, 2020), available at [nationalmagazine.ca/fr-ca/articles/law/hot-topics-in-law/2020/la-justice-a-distance](https://nationalmagazine.ca/fr-ca/articles/law/hot-topics-in-law/2020/la-justice-a-distance).

30 Minister of Justice and Attorney General of Québec, Budget 2018-2019/Justice, "A Plan to Modernize the Justice System" (March 27, 2018), available at [justice.gouv.qc.ca/fileadmin/user\\_upload/contenu/documents/En\\_Anglais/\\_centredoc/publications/ministere/dossiers/Justice\\_1819.pdf](https://justice.gouv.qc.ca/fileadmin/user_upload/contenu/documents/En_Anglais/_centredoc/publications/ministere/dossiers/Justice_1819.pdf).

31 Code of Civil Procedure, C.Q.L.R. c. C-25.01, Art. 26, available at [legisquebec.gouv.qc.ca/en/ShowDoc/csc/C-25.01](https://legisquebec.gouv.qc.ca/en/ShowDoc/csc/C-25.01). See also Jean-François De Rico & Patrick Gingras, "Les Premiers Pas de la Procédure Technologique: Regard Technologique sur le Nouveau Code de Procédure Civile," 21 *Lex Electronica* 1 (2016), available at [lex-electronica.org/articles/volume-21/les-premiers-regards-de-la-procedure-technologique-regard-technologique-sur-le-nouveau-code-de-procedure-civile](https://lex-electronica.org/articles/volume-21/les-premiers-regards-de-la-procedure-technologique-regard-technologique-sur-le-nouveau-code-de-procedure-civile).

32 Éric Thibault, "Le Système Judiciaire Arrivera Enfin au 21<sup>e</sup> Siècle: La Crise Forcera Nos Tribunaux à Moderniser Leurs Pratiques," *Le Journal de Montréal* (April 11, 2020) at 20, available at [journaldemontreal.com/2020/04/11/le-systeme-judiciaire-arrivera-enfin-au-21e-siecle](https://journaldemontreal.com/2020/04/11/le-systeme-judiciaire-arrivera-enfin-au-21e-siecle).

33 "Expanded Operations of the Superior Court – Civil and Family Matters (District of Montreal)," Superior Court of Québec (April 17, 2020), available at [tribunaux.qc.ca/c-superieure/avis/index\\_avis.html](https://tribunaux.qc.ca/c-superieure/avis/index_avis.html).

34 "A stronger Justice System Emerges as Québec Courthouses Gradually Resume Activities," Minister of Justice and Attorney General of Québec (May 28, 2020), available at [justice.gouv.qc.ca/en/press-releases/a-stronger-justice-system-emerges-as-quebec-courthouses-gradually-resume-activities](https://justice.gouv.qc.ca/en/press-releases/a-stronger-justice-system-emerges-as-quebec-courthouses-gradually-resume-activities).

35 See Québec Court of Appeal Digital Office website, available at <https://coudappelduquebec.ca/en/digital-office>.

36 See "Virtual Courtrooms," Court of Appeal of Québec, available at [coudappelduquebec.ca/en/virtual-courtrooms](https://coudappelduquebec.ca/en/virtual-courtrooms).

37 Vincent Gautrais, "Signature," LCCJTLCA, available at [lccjti.ca/definitions/signature](https://lccjti.ca/definitions/signature).

38 Mark Phillips, "Électronique Juridique et Juridisme Électronique," *Les Cahiers de Propriété Intellectuelle* 155 (2008), at 161, 165, available at [lccjti.ca/doctrine/electronique-juridique-et-juridisme-electronique](https://lccjti.ca/doctrine/electronique-juridique-et-juridisme-electronique).

39 See also Notaries Act, C.Q.L.R. c. N-3, Art. 45-61, available at [legisquebec.gouv.qc.ca/en/ShowDoc/cn/N-3](https://legisquebec.gouv.qc.ca/en/ShowDoc/cn/N-3).

40 "Temporary Measures Authorizing Notaries to Close Acts Remotely and Bailiffs to Serve Pleadings by Technological Means," Minister of Justice and Attorney General of Québec (March 28, 2020), available at [justice.gouv.qc.ca/en/press-releases/temporary-measures-authorizing-notaries-to-close-acts-remotely-and-bailiffs-to-serve-pleadings-by-te](https://justice.gouv.qc.ca/en/press-releases/temporary-measures-authorizing-notaries-to-close-acts-remotely-and-bailiffs-to-serve-pleadings-by-te); but see "Management of the Judiciary: Compilation of Comments and Comments by Country," Council of Europe, available at [coe.int/web/cepej/compilation-comments](https://coe.int/web/cepej/compilation-comments) (reflecting that notarial cases in civil jurisdictions across Europe have been treated in other ways in light of pandemic: prioritized by courts in Denmark, suspended in Portugal utilizing judicial holiday procedure, allowed in Serbia with discrete social distancing measures in place, and suspended in Italy).

41 "Regulation Respecting the Digital Official Signature of a Notary," C.Q.L.R. c. N-3, r.13.1, Art. 2, available at [legisquebec.gouv.qc.ca/en/ShowDoc/cr/N-3-%20r.%2013.1](https://legisquebec.gouv.qc.ca/en/ShowDoc/cr/N-3-%20r.%2013.1).

42 See Cristina N. Armella, "The Exercise of the Notarial Activity in Times of Pandemic: New Technologies at the Service of the Notarial Function," Int'l Union of Notaries (April 28, 2020), available at [www.uinl.org/en\\_GB/-the-exercise-of-the-notarial-activity-in-times-of-pandemic-new-technologies-at-the-service-of-the-notarial-function](https://www.uinl.org/en_GB/-the-exercise-of-the-notarial-activity-in-times-of-pandemic-new-technologies-at-the-service-of-the-notarial-function).

43 Notaires du Grand Paris, "Signature d'un Acte Chez le Notaire: Quelle Situation Pendant le Confinement?," Votre Notaire Vous Informe (April 2020), available at [fr.calameo.com/read/003616144b21750e7f304](https://fr.calameo.com/read/003616144b21750e7f304).

44 "Coronavirus Will Change the World Permanently. Here's How," *Politico* (March 19, 2020), available at [politico.com/news/magazine/2020/03/19/coronavirus-effect-economy-life-society-analysis-covid-135579](https://politico.com/news/magazine/2020/03/19/coronavirus-effect-economy-life-society-analysis-covid-135579).

# Last in Line

BY ERIC J. MONZO

## COVID-19 and Chapter 11

### Suspension Orders and Their Impact on Creditors' Rights

**Editor's Note:** ABI recently launched its *Coronavirus Resources for Bankruptcy Professionals* website ([abi.org/covid19](http://abi.org/covid19)), which aggregates information for bankruptcy professionals to assist clients and provide guidance due to the fallout from the COVID-19 pandemic.

### Suspension Orders Under the Bankruptcy Code

In recent months, professionals have seen bankruptcy courts grant extraordinary equitable relief to already financially distressed companies that have been further impacted by the COVID-19 pandemic. The harsh new reality has prompted certain debtors to request temporary suspensions of their chapter 11 cases pursuant to the courts' equity powers provided by the Bankruptcy Code, with some turning to § 305(a) while others have used § 105(a) in combination with nonbankruptcy law. Some courts have granted these "mothball" motions in cases of nonessential business, such as brick-and-mortar retail and restaurants.

The hope was to suspend the chapter 11 proceedings in order to provide additional breathing space to preserve their restructuring or liquidation efforts. These efforts included the following: (1) the debtor could preserve the value of its business and preserve jobs; (2) lenders could preserve the value of their collateral by not seeking the premature sale or liquidation in a depressed market; and (3) unsecured creditors could continue to do business with a viable reorganized entity or extract value from a liquidated entity that would be liquidating based on fair market value.

The first case to file a mothball motion resulting from the effects of COVID-19 was in *Modell's Sporting Goods Inc.*, which is pending in the U.S. Bankruptcy Court for the District of New Jersey. In this case, the debtors anticipated generating revenue through closeout sales, but because of the store closures and the lack of foot traffic, the revenue stream stalled and an immediate lack of cash to pay landlords while liquidating precipitated the need for the extraordinary requested relief. Cases in the Delaware<sup>4</sup> and Virginia<sup>5</sup> bankruptcy courts entered similar orders over the objections of landlords and other creditors in an effort to preserve value to the chapter 11 estates.

The *Modell's* motion sought relief pursuant to § 305(a), which permits the dismissal or suspension of a case if "the interests of creditors and the debtor would be better served," and § 105. Historically, § 305 has been used where state court litigation might cause a bankruptcy proceeding to be duplicative or unnecessary, or such as when minority credi-

The impact of the novel coronavirus, COVID-19, on chapter 11 cases continues to develop, and courts have responded to this crisis in myriad ways. As a result, the dire tension between debtors and general unsecured creditors has and likely will continue to be affected, and it is unclear whether the pandemic's fallout will have long-term repercussions on this relationship. Stay-at-home measures have resulted in many businesses shuttering or limiting operations, and unprecedented reactions have been seen from debtors and courts in an effort to counter the ill effects on debtors in existing chapter 11 cases, which found their restructuring planning shaken because of the virus's global impact. As a result, debtors and courts are attempting to adjust to find new and creative remedies within the Bankruptcy Code to preserve the value of their businesses.

For example, some brick-and-mortar retail and other debtors that rely on consumer foot traffic for revenue, and that looked to chapter 11 to provide relief through well-laid plans of orchestrating going-out-of-business sales or systematic restructurings, have turned to requesting novel and extraordinary equitable relief under §§ 305(a) and 105(a). Debtors are looking to suspend or "mothball" their cases under § 305(a)<sup>1</sup> and/or 105(a)<sup>2</sup> as a result of the pandemic, while others have been forced into chapter 7 liquidation, unable to convince stakeholders that the company should stay in chapter 11.<sup>3</sup> This article explores these suspension orders and assesses the resulting treatment of the claims and rights of general unsecured creditors in the wake of this pandemic.



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1 See, e.g., *In re Modell's Sporting Goods Inc.*, No. 20-14179, D.E. 166, 294 (Bankr. D.N.J. March 27, 2020, further extended by order dated April 30, 2020).

2 See, e.g., *In re Craftworks Parent LLC*, No. 20-10475, D.E. 217, 220 (Bankr. D. Del. March 30, 2020); *In re Pier 1 Imports Inc.*, No. 20-30805, D.E. 493 (Bankr. E.D. Va. April 6, 2020).

3 See *In re Art Van Furniture LLC*, No. 20-10553, D.E. 263 (Bankr. D. Del. April 7, 2020) (converting case to chapter 7). The proposed chapter 7 trustee to the Art Van estates has proposed his own form of suspension procedures. See also *In re VIP Cinema Holdings Inc.*, No. 20-10345 (Bankr. D. Del. April 7, 2020) (approving motion to pay post-petition severance). VIP Cinema was a manufacturer of movie theater seats and sought chapter 11 relief in Delaware in February 2020. It filed a consensual prepackaged plan to reduce its balance sheet. However, the pandemic saw VIP Cinema's market quickly disappear, along with the feasibility of its plan. VIP Cinema was forced to pivot from a reorganization to a liquidation as management resigned and plan supporters withdrew.

4 See *In re Craftworks Parent LLC*, No. 20-10475 (Bankr. D. Del.); *In re Forever 21 Inc.*, Case No. 19-12122 (Bankr. D. Del.).

5 *In re Pier 1 Imports Inc.*, No. 20-30805 (Bankr. E.D. Va. April 6, 2020), Order Granting (I) Relief Related to the Interim Budget, (II) Temporarily Adjourning Certain Motions and Applications for Payments, and (III) Granting Related Relief.

tors attempt to force an involuntary bankruptcy as negotiation leverage.<sup>6</sup> *Modell's* mothball proposal sought to pay only critical expenses, such as wages and insurance, during the suspended period while other expenses were deferred, yet also sought to maintain the automatic stay and adjourn deadlines through 21 days past the suspended period of the cases.

Landlords objected to the debtors' request, arguing that such relief would result in their subsidizing the recovery of secured lenders. The court granted the motion with certain restrictions, including the suspension of an initial 30-day period, and allowed the parties relief from the court during the suspension "with respect to exigent and unforeseen circumstances" that could not be consensually resolved.<sup>7</sup>

In late April 2020, *Modell's* debtors sought to extend the initial 30-day case suspension for an additional 30 days. The debtors argued that the creditors would benefit in the long term by further extending the mothball order because the suspension would enable the debtors to recommence store closing sales at a later date for the benefit of all parties-in-interest. The *Modell's* debtors also argued that they were excused from making payments under the doctrine of frustration of purposes and intervening impossibility because they were without any other options than to suspend the store liquidation process resulting from the government-mandated shutdowns.

By order dated April 30, 2020, the court granted the requested relief over the objection of certain creditors, including landlords. The landlords objected to the continued suspension of the cases, arguing, among other things, that the suspension should be conditioned upon § 365(d)(3), which sets a 60-day limit on rental deferrals. Specifically, they argued that § 365(d)(3) provides that "[t]he court may extend, for cause, the time for performance of any [lease] obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period."<sup>8</sup> The landlords argued that the requested relief under §§ 305 and 105 exceeded statutory authority because § 365 requires performance of post-petition obligations no later than 61 days after the petition date. Further, the landlords noted that the request under § 105 could not be used as a basis to support the continued request because § 105 cannot be used to extend or override existing provisions of the Bankruptcy Code, pointing to Hon. Mary F. Walrath's recent decision in *Forever 21*.<sup>9</sup> Cases that are coming into bankruptcy in more recent days and weeks, after the stay-at-home orders have been in effect for a few weeks or longer, are filing suspension motions as part of the requested first-day relief.<sup>10</sup> The requested relief relies primarily on § 365(d)(3) to provide the 60 days of suspension, with § 105 playing a supporting role.<sup>11</sup>

In a different procedural posture, in *Pier 1* the bidding deadline for its auction had passed when the debtors filed their emergency motion on March 31, 2020. The debtors argued to the U.S. Bankruptcy Court for the Eastern District of Virginia that the governmental shutdown of their stores had inhibited their opportunity for any going-concern transactions, and as a result, they were left with offers of liquidation.<sup>12</sup> Rather than rely on § 305(a), the debtors sought bankruptcy court approval of their suspension order under the court's equitable powers under § 105(a), with § 365(d)(3) unavailable, arguing instead that the governmental shelter-in-place order constituted a government taking that triggered abatement clauses in their leases and that they were further excused from performance under doctrines of impossibility and frustration of purpose.

The *Pier 1* debtors also sought to enforce contracts with vendors and other nonlease creditors during the suspension period and proposed alternative procedures under which creditors could seek administrative expenses. The motion was granted, and the debtors were relieved from paying rent to landlords who did not otherwise agree to a rent reduction and were permitted to not make payments to certain vendors, shippers and other suppliers during the period of the order. In *Pier 1*, like the other courts granting motions to suspend, requested monthly hearings to address material disputes.

On May 10, 2020, in a subsequent memorandum opinion, the court in *Pier 1* granted the debtors' motion seeking to temporally halt payment of rent.<sup>13</sup> The court permitted the debtors to skip rent payments during the pandemic (April and May) pursuant to § 365(d)(3) although "timely" payment is required.<sup>14</sup> The debtors were able to suspend the rent payments, but they would remain obligated to pay the rent and such obligation would be deemed an administrative expense.

The court did not require immediate payment, stating, "To compel payment by the Debtors now would elevate payment of rent to the Lessors to superpriority status, i.e., a claim that would be paid before all other accrued but unpaid administrative expense claims."<sup>15</sup> Extending the moratorium until May 31, by an order dated May 5, 2020, the opinion explained the court's reasoning for its decision and stated that "[T]here is no feasible alternative to the relief sought" by the landlords.<sup>16</sup>

## The Fallout of Suspension Orders

While the response from creditors to suspension orders is making its way through the court system, the impact of such orders on creditors is not as overt. The administrative burn created by mothballed landlords and other administrative-expense-holders may continue to result in debtors trying to pick and choose what post-petition expenses should be paid after the suspension order ends. The Bankruptcy Code requires that expenses incurred during the pendency of a chapter 11 case be paid in full prior to confirmation of a chapter 11 plan.<sup>17</sup>

6 Congress acknowledged that bankruptcy courts should decline jurisdiction over certain cases with the enactment of § 305. See *In re Bus. Info. Co. Inc.*, 81 B.R. 382 (Bankr. W.D. Pa. 1988); see also *In re DGE Corp.*, 2006 WL 4452846, \*3 (Bankr. D.N.J. 2006) ("Several courts have held that abstention or dismissal is appropriate when another forum is available to determine the parties' interests and, in fact, such an action has been commenced.")

7 See *Modell's Sporting Goods* March 27, 2020, Suspension Order, at ¶ 2.b.  
8 11 U.S.C. § 365(d)(3).

9 In *Forever 21*, the purchaser requested modification of the sale order in which the court denied stating that "the Supreme Court has told us in *Law v. Segal* that any relief granted under [Section] 105 must be in furtherance of a Bankruptcy Code provision and not in contravention of any specific provision." See Transcript, *In re Forever 21 Inc., et al.*, Case No. 19-12122 (Bankr. D. Del. April 21, 2020).

10 See *In re Chinos Holdings Inc.*, Case No. 20-32181 (Bankr. E.D. Va.), at Docket No. 23, entitled Motion of Debtors for Entry of Order (i) Extending Time for Performance of Obligations Arising Under Unexpired Non-Residential Real Property Leases, and (ii) Granting Related Relief.

11 *Id.* See also *In re True Religion Apparel Inc.*, Case No. 20-10941 (Bankr. D. Del. May 6, 2020).

12 *In re Pier 1 Imports Inc.*, No. 20-30805 (Bankr. E.D. Va.).

13 *In re Pier 1 Imports Inc.*, No. 20-30805 (Bankr. E.D. Va. May 10, 2020).

14 *Id.* at p. 8.

15 *Id.*

16 *Id.* at p. 10.

17 11 U.S.C. § 365(d)(3), (d)(5), 4 *Collier on Bankruptcy* ¶ 503.03[4] (Richard Levin & Henry J. Sommer eds., 16th ed.) (noting that "ordinary course of business" post-petition administrative expenses "generally are paid when due").

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For example, in *Pier 1*, the mothball order froze expenses associated with brick-and-mortar store locations while maintaining that the e-commerce business and payments to corresponding vendors be deemed critical to the debtors' e-commerce business. Post-petition payments to landlords, vendors, shippers and suppliers were deferred after the cases had been pending for weeks or months. Ordinarily, if administrative expenses cannot be paid in full, then the debtor is deemed administratively insolvent and the case might be converted to a chapter 7 liquidation, but these are not ordinary times.

This prioritizing of administrative creditors, while possibly acceptable as a short-term fix, will likely face its own resistance as the pandemic continues. For example, in *Toys "R" Us*,<sup>18</sup> the debtors sought to set aside funds to compensate vendors for goods shipped after a certain date, leaving other administrative creditors out of the money. Courts might be hesitant to enforce such a long-term practice that appears to discriminate between administrative-expense-holders, but they may have no other option if they want to avoid a liquidation.

Further, vendors — facing their own challenges in the wake of COVID-19 — might, after any suspension order is lifted, have their own difficulty continuing business, and might be unable to fulfill customer orders even presuming that ongoing trade terms might be successfully negotiated. It would not be surprising to learn that even after a debtor determines that critical-vendor or other post-petition dollars are appropriate to pay a vendor, said vendor is unable to perform based on its own supply chain or other coronavirus-related disruption, whether by shipping delays, cancellation

or internal concerns at factories or fulfillment centers because of the implementation of important public health policies to prevent the spread of the virus.

### Conclusion

This mothballing strategy certainly departs from the accepted norm that chapter 11 requires debtors to pay administrative expenses, including landlords and current vendors, in a timely manner. However, the suspension of the cases provides a pause with the hopes that the disruption is short-lived and liquidity may be restored in time and hopefully provide a benefit to stakeholders. The courts, when granting creeping suspension such as in *Modell's*, are permitting ongoing uncertainty to stakeholders (such as landlords) as orders are extended monthly. The impact has yet to be determined.

As the pandemic shutdown of nonessential businesses in many states has been extended beyond April 30, 2020, it is unclear whether the suspension of cases will delay an inevitable liquidation or provide the anticipated useful extension of support to allow the cases to continue in chapter 11. Of those chapter 11 debtors that survive, the COVID-19 crisis may result in efforts to fast-track funds for critical administrative expenses to employees, professionals and certain vendors in order to keep certain portions of the business (such as online sales) operational, yet leave other creditors (such as landlords and other vendors) out of the money. Such a strategy to further prop up liquidity likely also further reduces or eliminates the possibility of recovery to unsecured creditors, because if such administrative expenses cannot be paid, there is little chance that general unsecured creditors will recover on their claims. **abi**

18 See *In re Toys "R" Us Inc.*, Case No. 17-34665 (Bankr. E.D. Va., March 25, 2018) (orders (1) authorizing wind-down of U.S. operations and postponing creditors' efforts to collect on administrative claims, and (2) establishing dates by which parties holding such administrative claims must file proofs of claim).

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# Bankruptcy by the Numbers

BY ALLEN J. LYNCH

## The Next Chapter for Brick-and-Mortar Retail

This article is the second in a series for the *ABI Journal* about the current state of brick-and-mortar retail; the first article<sup>1</sup> addressed the real and perceived problems behind the long-term decline in brick-and-mortar retail. This article analyzes the events in this segment since 2017 and comments on the longer-term structural impact of the COVID-19 pandemic.



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### Summary of the First Article

- Analysts and the general public believed, and many still believe, that the growth in online retailing is exclusively the cause of the decline in retailers with stores. This is only partially correct. In 2019, online sales was 11 percent of total retail.<sup>2</sup> A substantial portion of online sales are made through omnichannel brick-and-mortar retailers, making the “Amazon factor” less than 11 percent.
- The U.S. has more retail space per capita than any other developed country, 1.4 times the second-highest country (Canada), and five times that of Japan, France and the U.K. (see Exhibit 1).<sup>3</sup>
- The retailers in decline pre-pandemic were also the most challenged merchandisers who lacked strong brand equity. Sears, K-Mart and JCPenney are the most well-known examples.
- Problems within the segment were accelerated and compounded by highly leveraged LBO structures, many of which transferred real estate into separate entities and increased rent to unsustainable levels. An example is the Toys “R” Us bankruptcy in 2017, where the once-iconic retailer crumpled under a \$5 billion debt load from a leveraged buyout.<sup>4</sup> Prior to the leveraged buyout, Toys “R” Us owned the vast majority of its retail store portfolio.

### The Next Chapter: New Challenges Accelerate Existing Secular Decline

The COVID-19 pandemic and social distancing guidelines have accelerated previously existing retail trends and steepened brick-and-mortar decline. This has led to a “tale of two retails”: A number of retail sectors — such as daily needs, convenience and “treasure-hunt” (or retail stores such as TJ Maxx, Ross or Dollar Tree that specialize in unique close-out or overstock merchandise, and therefore may offer unique “finds” on one shopping trip that might not be available on the next) — will adapt and thrive, while others may no longer be viable. There is likely to be a considerable domino effect of collateral damage in ways not immediately obvious.

### Retail Filings Continue to Increase

Retail bankruptcies are nearing a post-recession high, and several observations can be made:

- As of July 10, 2020, 16 retailers have filed for bankruptcy reorganization or liquidation. This number is certain to increase as the COVID-19 pandemic continues.<sup>5</sup> This will be particularly true for retailers who will use the chapter 11 process to reduce store footprint.
- The rising number of retail bankruptcies comes as consumers are making more purchases online (approximately 11 percent in 2019<sup>6</sup>). The online percentage is projected to exceed 15.5 percent by 2022 and could wind up being even greater due to COVID-19 impact.<sup>7</sup>
- Coresight estimates that 25,000 stores will close by the end of the year,<sup>8</sup> while UBS predicts that more than 100,000 stores will close in the next five years.<sup>9</sup> This is greater than the annual store closures during the Great Recession. Exhibit 2 shows a breakdown of annual units closing since 2000, and the chapter 11 filings for 2020 are revealing.

### 2020 Chapter 11 Filings

As of spring 2020, *CreditRiskMonitor* posits that the number of retailers at high risk of bank-

1 See J. Michael Issa, “The Rest of the Story About the State of Brick-and-Mortar Retail,” XXXVI *ABI Journal* 11, 36-37, 78-80, November 2017, available at [abi-journal.com](http://abi-journal.com) (unless otherwise specified, all links in this article were last visited on July 24, 2020).

2 Sarah Perez, “U.S. e-Commerce Sales to Jump 18 Percent in 2020, but Not Enough to Offset Retail’s Decline,” *TeleCrunch* (June 8, 2020), available at [techcrunch.com/2020/06/08/u-s-e-commerce-sales-to-jump-18-in-2020-but-not-enough-to-offset-retails-decline](http://techcrunch.com/2020/06/08/u-s-e-commerce-sales-to-jump-18-in-2020-but-not-enough-to-offset-retails-decline).

3 Hayley Peterson, “The Retail Apocalypse Is Still in Its ‘Early Innings’ — and Thousands More Stores Will Close Before It Ends,” *Business Insider* (Oct 3, 2018), available at [businessinsider.com/retail-apocalypse-is-still-in-early-innings-cowen-says-2018-10](http://businessinsider.com/retail-apocalypse-is-still-in-early-innings-cowen-says-2018-10).

4 Michael Corkery, “Toys ‘R’ Us Files for Bankruptcy, Crippled by Competition and Debt,” *N.Y. Times* (Sept. 19, 2017), available at [nytimes.com/2017/09/19/business/dealbook/toys-r-us-bankruptcy.html](http://nytimes.com/2017/09/19/business/dealbook/toys-r-us-bankruptcy.html).

5 “The Running List of 2020 Retail Bankruptcies,” *Retail Dive* (as of July 13, 2020), available at [retaildive.com/news/the-running-list-of-2020-retail-bankruptcies/571159](http://retaildive.com/news/the-running-list-of-2020-retail-bankruptcies/571159).

6 See Perez, *supra*, n.2.

7 *Id.*

8 Lauren Thomas, “25,000 Stores Are Predicted to Close in 2020, as the Coronavirus Pandemic Accelerates Industry Upheaval,” *CNBC* (June 9, 2020), available at [cnbc.com/2020/06/09/coresight-predicts-record-25000-retail-stores-will-close-in-2020.html](http://cnbc.com/2020/06/09/coresight-predicts-record-25000-retail-stores-will-close-in-2020.html).

9 “U.S. Retail: We Expect 100K Stores Will Close — Interactive Model,” UBS Global Research (April 22, 2020).

ruptcy has risen to 27. These retailers shown in Exhibit 2 all have FRISK scores under 2<sup>10</sup> as of May 1, 2020. Scores this low suggest that bankruptcy filings within 12 months are very likely for these entities, especially those that must reduce legacy store footprint. FRISK scores only apply to publicly traded companies (see Exhibit 3 on p. 60).

A number of these, including J. Crew, Neiman Marcus and JCPenney, filed for chapter 11 protection after the *CreditRiskMonitor* report was published. Of the 16 retailers that filed for bankruptcy in the first half of 2020, half of those occurred in the month of May.<sup>11</sup>

<sup>10</sup> Ben Unglesbee, "These 27 Retailers Could File for Bankruptcy as Pandemic Roids the Industry," *Retail Dive* (May 4, 2020), available at [retaildive.com/news/these-27-retailers-could-file-for-bankruptcy-as-pandemic-roids-the-industry/576982](https://retaildive.com/news/these-27-retailers-could-file-for-bankruptcy-as-pandemic-roids-the-industry/576982).

<sup>11</sup> See *supra* n.5.

## Store Closings

As a result of excess retail space in the U.S., Credit Suisse predicted in 2017 that 20-25 percent of all U.S. malls would close by 2022.<sup>12</sup> This suggests that thousands of malls, most particularly "B" and "C" class malls, many in small towns, could close given that there are 116,000 malls in the U.S.<sup>13</sup> Mall-based retailers that announced store closings in 2020 include J. Crew, JCPenney, Neiman Marcus and Roots USA. Until there is a viable and readily available COVID-19 vaccine, and with continued infections an

<sup>12</sup> Phil Wahba, "Major Wall Street Firm Expects 25% of U.S. Malls to Close by 2022," *Fortune* (May 31, 2017), available at [fortune.com/2017/05/31/malls-retail-stores-closing](https://fortune.com/2017/05/31/malls-retail-stores-closing).

<sup>13</sup> "Number of Shopping Malls in the United States from 1970 to 2017," Statista, available at [statista.com/statistics/208059/total-shopping-centers-in-the-us](https://www.statista.com/statistics/208059/total-shopping-centers-in-the-us).

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Exhibit 1: Retail Space Per Person (sf/person)

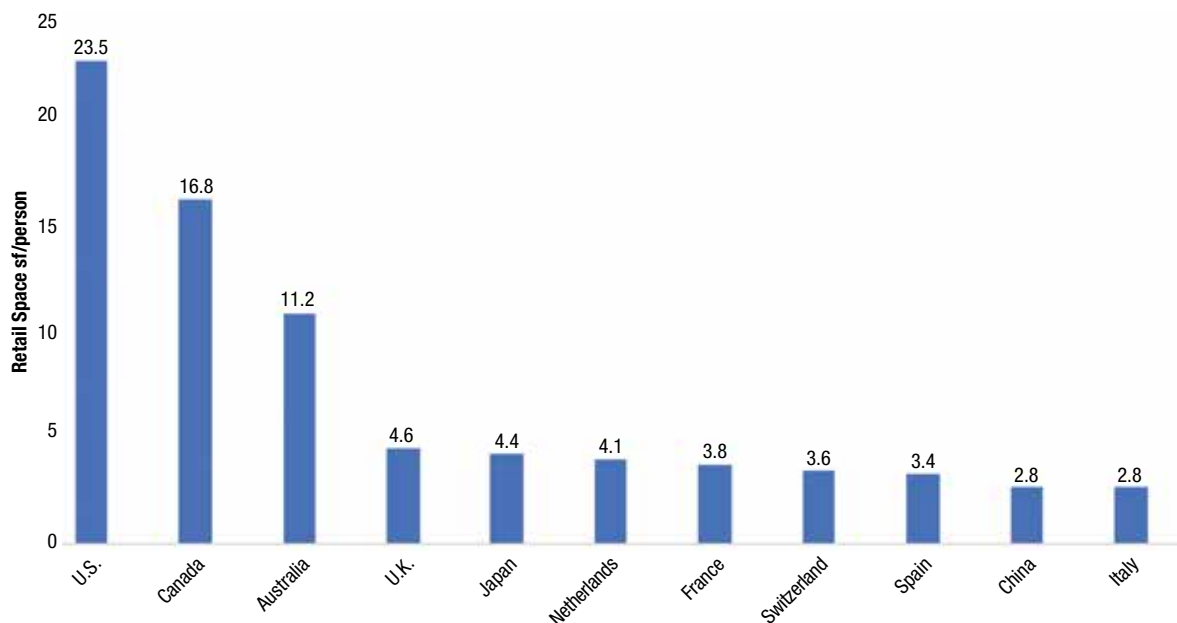
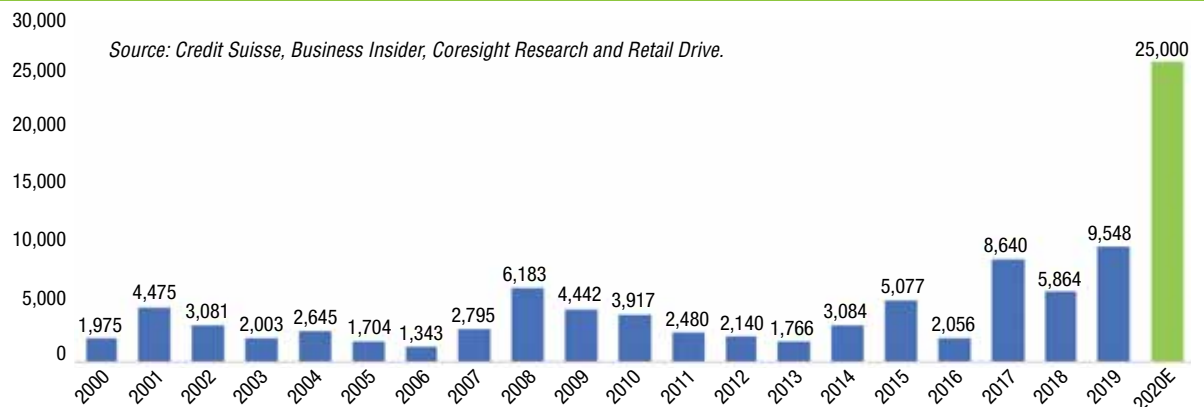


Exhibit 2: Retail Store Closures by Year



## Bankruptcy by the Numbers: The Next Chapter for Brick-and-Mortar Retail

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ongoing threat, the retail prognosis will remain especially unclear in the short term.

### Collateral Damage on Malls from Anchor Store Closings

As of the fourth quarter of 2019, Sears, Macy's, JCPenney and Neiman Marcus owned a combined 225 million square feet of retail space.<sup>14</sup> It is likely that much of this well-located mall space might be demolished to make way for more sustainable residential or logistics uses.

Sears or Seritage (a related REIT) owns most of its store real estate.<sup>15</sup> When Sears goes dark, the owner of the shopping center cannot unilaterally redevelop a Sears Holdings store; the mall owner needs to make a deal with Sears, Seritage or another third-party owner, as well as obtain consents from other major stakeholders in the shopping center. Absent such an agreement, a Sears location could sit dark for years, as some have.<sup>16</sup> A dark anchor has a profound impact on a shopping center's traffic, and sales per square foot for the other tenants might decline as a result.

Many other tenants in these shopping centers have lease co-tenancy clauses. When one of the anchors ceases operations, the leases of several other tenants have contractual clauses mandating an automatic step-down in lease rates, causing an immediate additional reduction in NOI for the center.

Shopping center developers spend time and money to create synergy through a focus on tenant mix and cross-shopping in order to maximize the overall sales per square foot of the shopping center. Many alternative uses will not achieve the same synergy for the benefit of other tenants. An example is the re-tenanting of the closed Mervyn's locations, many of which were converted to health clubs. The health club alternative might not be as accretive to the success of the shopping centers' other tenants as a successful department store. With the current COVID-19 pandemic, the redevelopment of department stores into health clubs has now come full circle, as many health club locations will need to be reimagined, redeveloped and/or retenanted. One of the reasons it is likely that some of this obsolete retail space might be repurposed for high-density residential use is to create synergy through development of an environment where both retail users and residents benefit from immediate proximity.

<sup>14</sup> "Neiman Marcus Store Locations," available at [neiman.gcs-web.com/company-information/store-locations](http://neiman.gcs-web.com/company-information/store-locations); "Macy's Store Count and Square Footage," available at [macysinc.com/about/store-count-and-square-footage](http://macysinc.com/about/store-count-and-square-footage); Adam Levine-Weinberg, "JCPenney Wants Smaller Stores — Getting There Will Be a Challenge," *Motley Fool* (Feb. 2, 2019), available at [fool.com/investing/2019/02/02/jc-penney-wants-smaller-stores-getting-there-will-be-a-challenge](http://fool.com/investing/2019/02/02/jc-penney-wants-smaller-stores-getting-there-will-be-a-challenge); "Number of Department Stores of JCPenney in the United States from 2012 to 2019," Statista, available at [statista.com/statistics/751050/number-of-stores-of-jcpenney](http://statista.com/statistics/751050/number-of-stores-of-jcpenney); Lauren Thomas, "Retailers Announced Record Store Closures in 2019. Here's a List," CNBC (Dec. 21, 2019), available at [cnbc.com/2019/12/20/sears-walgreens-among-retailers-that-closed-stores-in-2019.html](http://cnbc.com/2019/12/20/sears-walgreens-among-retailers-that-closed-stores-in-2019.html).

<sup>15</sup> "How Sears' Dying Stores Are Fuelling a New Fortune in Real Estate," *Financial Post*, available at [business.financialpost.com/real-estate/property-post/how-sears-dying-stores-are-fuelling-a-new-fortune-in-real-estate](http://business.financialpost.com/real-estate/property-post/how-sears-dying-stores-are-fuelling-a-new-fortune-in-real-estate).

<sup>16</sup> Hayley Peterson, "Haunting Photos of Dead and Deserted Sears Stores as Experts Warn the End Is 'Very Near,'" *Business Insider* (Dec. 11, 2015); see also Rocco Pendola, "16 Pathetic Pictures from an Iconic L.A. Sears Store That's Now a Dump," *The Street* (May 6, 2014).

### Viability of Certain Retail Segments in a Social-Distancing Environment

#### Restaurants

There is a considerable question about the viability of full-service restaurants in an ongoing social-distancing environment. Most full-service restaurants must achieve high occupancy levels in order to be profitable. Approximately 44 percent<sup>17</sup> of the restaurants in the U.S. are full service. Many restaurants are being forced to re-engineer their business models in order to increase take-away sales and reduce the current labor footprint, especially in states like California with higher labor costs. Here are a few facts to consider:

- There are more than 1 million restaurant locations in the U.S.<sup>18</sup>

<sup>17</sup> Adam Jones, "An Overview of the U.S. Restaurant Industry," *Market Realist* (Dec. 1, 2014), available at [marketrealist.com/2014/12/overview-u-s-restaurant-industry](http://marketrealist.com/2014/12/overview-u-s-restaurant-industry).

<sup>18</sup> "Restaurant Industry Facts at a Glance," Nat'l Rest. Ass'n, available at [restaurant.org/research/restaurant-statistics/restaurant-industry-facts-at-a-glance](http://restaurant.org/research/restaurant-statistics/restaurant-industry-facts-at-a-glance).

#### Exhibit 3

Retailer	FRISK Rating	Sector
Ascena	1	Apparel
J. Jill	1	Apparel
RTW RetailWinds	1	Apparel
JCPenney	1	Department Stores
Neiman Marcus	1	Department Stores
Stein Mart	1	Discount/Apparel
Rite Aid	1	Drug Stores
Kirkland's	1	Home Goods
GameStop	1	Specialty
GNC	1	Specialty
Party City	1	Specialty
Christopher & Banks	2	Apparel
Express	2	Apparel
Francesca's	2	Apparel
L Brands	2	Apparel
Tailored Brands	2	Apparel
Children's Place	2	Apparel
Destination XL	2	Apparel
Caleres	2	Footwear
At Home	2	Home Goods
The Container Store	2	Home Goods
Tuesday Morning	2	Home Goods
Wayfair	2	Home Goods
Conn's	2	Home Goods/Electronics
Chewy	2	Pet
Michaels	2	Specialty
iMedia Brands	2	Television Retail

- The restaurant industry is estimated to employ 15.6 million workers.<sup>19</sup> This segment's employment is more than 11 percent of total U.S. employment of 137.2 million.<sup>20</sup>
- California has 76,201 locations<sup>21</sup> with 1.83 million jobs (11 percent of total employment in the state).
- Typical restaurants have food and labor costs of 60-65 percent of sales. Occupancy averages 10 percent of sales. Profit margins are likely to range from 5-8 percent during normal economic periods. To break even, occupancy of 80-85 percent of available seats is the average benchmark. This will likely be a daunting challenge in an ongoing social-distancing environment.<sup>22</sup>
- Certain restaurants might be able to generate 15-20 percent of sales from take-out via delivery services. The economic issue is that delivery services charge up to 30 percent, further eroding the margins.<sup>23</sup> It is likely that the delivery model will continue to evolve as a result.

### Health Clubs

In an ongoing social-distancing environment, it is virtually certain that the revenue run rate after the reopening of health clubs will decline. One Orange County, Calif., large-format club for which there is data was averaging 3,400 visits per day prior to the pandemic. It is highly unlikely — at least in the short term — that this volume of visits can be sustained in a safe way. Also note that incremental operating costs will be incurred to sanitize equipment after each use and to constantly enforce distancing of members. Here is some data to consider:

- There are 39,570 health clubs in the U.S. as of 2018.<sup>24</sup>
- U.S. health club employees total 807,955.<sup>25</sup>
- COVID-19 has been estimated to have caused as much as a \$10 billion decline in health club revenue.<sup>26</sup>
- Health clubs that have replaced department stores could now face closures or major restructurings themselves. This will cause further occupancy and debt-service problems in malls.
- Approximately 34 percent of gym exercisers claim to have canceled or plan to cancel their membership after COVID-19 (more than 20 million members could cancel), according to a survey done by Harrison Co.<sup>27</sup>
- About 29 percent of gym members are over the age of 54, the demographic which is most vulnerable to the virus.<sup>28</sup>

- Both Gold's Gym and 24-Hour Fitness filed for bankruptcy in 2020.<sup>29</sup> There has been a trend in recent years toward larger format clubs, some as large as 80,000 square feet. These large clubs present a challenge to re-let and will likely need to be divided and/or redeveloped into smaller spaces.

Although most clubs and chains are privately owned, Planet Fitness is public. Here's a look at what the company's 10-K reveals:

- Planet Fitness has 2,001 clubs. All but a handful are in the U.S.
- Approximately 1,900 of those clubs are franchisee owned and operated, suggesting that a high percentage of the clubs in the system may not have direct access to the capital markets of their public franchisor.
- Their average club is 20,000 square feet.
- The aggregate footage of the clubs in the system totals 40 million square feet.
- In many of their locations, Planet Fitness is the primary anchor tenant, bringing a large amount of traffic to the shopping center. Many of these locations represent second-generation space in Class "B" or "C" shopping centers. A closure of a large number of Planet Fitness gyms can present significant financial challenges for shopping centers of non-prime caliber and tenant profile.
- Given the continued focus on national health, it is likely that many customers will gradually return to their preferred health club, especially after a vaccine has been developed. As personal spending is more guarded, value-priced chains like Planet Fitness will probably be the best positioned. However, until that time, it is most likely that clubs will be forced to raise membership rates, reduce services or reduce occupancy costs to offset lost revenue. Given the alternative of a shuttered club and potential re-tenanting costs, many landlords will likely consider adjustments to occupancy costs, especially in the short term.

### Cinemas

Early during the COVID-19 pandemic, AMC, the world's largest theater company, issued going-concern guidance, saying that there was a "substantial doubt about its ability to continue as a going concern for a reasonable period of time." In early July 2020, AMC announced that it had completed a restructuring with existing bondholders that should provide necessary liquidity reserves through 2021. Here is a breakdown of AMC's numbers:

- There are 5,869 theater locations in the U.S. (2019); that number has been declining since 1995 (7,744) (see Exhibit 4 on p. 62).<sup>30</sup>
- There are 41,172 movie screens in the U.S.<sup>31</sup>
- Total theater employment is 164,622.<sup>32</sup>

<sup>19</sup> *Id.*

<sup>20</sup> "The Employment Situation — May 2020," Bureau of Labor Statistics (June 5, 2020), available at [www.bls.gov/news.release/pdf/empst.pdf](http://www.bls.gov/news.release/pdf/empst.pdf).

<sup>21</sup> 2018 Source, California Restaurant Ass'n.

<sup>22</sup> "What Restaurants Will Survive Coronavirus?," CBS New York (June 3, 2020), available at [newyork.cbslocal.com/2020/06/03/restaurants-sit-down-delivery-takeout-coronavirus](http://newyork.cbslocal.com/2020/06/03/restaurants-sit-down-delivery-takeout-coronavirus).

<sup>23</sup> Noah Lichtenstein, "The Hidden Cost of Food Delivery," *TechCrunch* (March 16, 2020), available at [techcrunch.com/2020/03/16/the-hidden-cost-of-food-delivery](http://techcrunch.com/2020/03/16/the-hidden-cost-of-food-delivery).

<sup>24</sup> Melissa Rodriguez, "Latest IHRSA Data: Over 6B Visits to 39,570 Gyms in 2018," IHRSA (March 28, 2019), available at [ihrsa.org/about/media-center/press-releases/latest-ihrsa-data-over-6b-visits-to-39-570-gyms-in-2018](http://ihrsa.org/about/media-center/press-releases/latest-ihrsa-data-over-6b-visits-to-39-570-gyms-in-2018).

<sup>25</sup> "Gym, Health and Fitness Clubs Industry in the U.S. — Market Research Report," IBISWorld, available at [ibisworld.com/united-states/market-research-reports/gym-health-fitness-clubs-industry/](http://ibisworld.com/united-states/market-research-reports/gym-health-fitness-clubs-industry/).

<sup>26</sup> Sonali Basak, "Fitness Clubs Facing \$10 Billion Revenue Hit as Members Flee," *Bloomberg* (May 26, 2020), available at [bloomberg.com/news/articles/2020-05-26/fitness-clubs-facing-10-billion-revenue-hit-as-members-flee](http://bloomberg.com/news/articles/2020-05-26/fitness-clubs-facing-10-billion-revenue-hit-as-members-flee).

<sup>27</sup> "Consumer Fitness Survey Finds Post-COVID-19, Billions in Spend Will Be Lost or Reallocated in Massive Industry Transformation," *Business Wire* (May 26, 2020), available at [businesswire.com/news/home/20200526005202/en/Consumer-Fitness-Survey-Finds-Post-COVID-19-Billions](http://businesswire.com/news/home/20200526005202/en/Consumer-Fitness-Survey-Finds-Post-COVID-19-Billions).

<sup>28</sup> "IHRSA Research Sheds Light on Gen Z Health Club Habits," IHRSA (Oct. 1, 2019), available at [ihrsa.org/improve-your-club/industry-news/ihrsa-research-sheds-light-on-gen-z-health-club-habits](http://ihrsa.org/improve-your-club/industry-news/ihrsa-research-sheds-light-on-gen-z-health-club-habits).

<sup>29</sup> Case List, available at [restructuring.primeclerk.com](http://restructuring.primeclerk.com).

<sup>30</sup> "Number of U.S. Movie Screens," Nat'l Ass'n of Theatre Owners, available at [natoonline.org/data/us-movie-screens](http://natoonline.org/data/us-movie-screens).

<sup>31</sup> *Id.* (2019 source).

<sup>32</sup> "Movie Theaters in the U.S. Industry Trends (2014-2019)," IBISWorld, available at [www.ibisworld.com/united-states/market-research-reports/movie-theaters-industry/](http://www.ibisworld.com/united-states/market-research-reports/movie-theaters-industry/).

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While it might be possible to operate at 50 percent of capacity and still generate four-wall income before deducting occupancy costs, it is unlikely that any theater company can do so for an extended period of time and continue to pay its contractual rent (see Exhibit 5). Finally, note that AMC has historically outperformed its competitors. The following quote is from its 2019 10-K: “AMC outperformed the U.S. industry [in 2019] on both attendance per screen and admissions revenue per screen by approximately 230 and 490 basis points.”

If an industry performance leader issues gong-concern guidance, it is a challenge to imagine that the other players in this segment can survive and prosper in an ongoing social-distancing environment. It is likely that the cinema industry will continue to shrink, coalescing around a smaller group of larger, centrally located multiplex facilities in the years ahead. As with health clubs, cinema landlords will need to weigh the potential for a shuttered, single-purpose cinema building against a reasonable approach to restructuring tenant operating costs, especially in the short term.

### Retail Real Estate

Here is a summary of retail real estate amid the pandemic:

- 40 percent of the U.S.’s major retailers requested relief or deferral of May rent payments.<sup>33</sup>
- U.S. retail space is 23.5 square feet per person.<sup>34</sup> U.S. population is 328 million (2019), making total U.S. retail space 7.7 billion square feet.
- Rents are forecasted to decline a total of 5.2 percent (asking) and 7 percent (effective) by the end of 2021.
- The national average NNN rent for strip shopping centers equals \$18 per square foot; the national average NNN rent for malls equals \$25 per square foot.<sup>35</sup>

33 Courtney Moore, “Coronavirus Made 40% of Major Retailers Skip May Rent Payments,” Fox Business (June 9, 2020), available at [foxbusiness.com/story/coronavirus-retailers-skip-may-rent-payments](https://www.foxbusiness.com/story/coronavirus-retailers-skip-may-rent-payments).

34 Peterson, *supra* n.3.

- The average retail price per square foot equals \$192 per square foot.<sup>36</sup>
- Commercial real estate (CRE) loans in the U.S. total \$2.37 trillion.<sup>37</sup> The largest CRE holder is Wells Fargo with \$121 billion.

### Conclusion

The U.S. has more retail space per capita than all other developed countries. This will continue to be a headwind for landlords, retailers and their lenders.

The previously existing challenges facing the industry space have been accelerated and are now even more ominous. Absent a viable, readily available vaccine or other solution to the pandemic, it is difficult to imagine anything less than a material and sustained change in the method of retailing in the U.S. and worldwide.

35 “Commercial Real Estate Market Trends and Outlook,” Nat’l Ass’n of Realtors, available at [nar.realtor/commercial-real-estate-market-trends-and-outlook/july-2019-commercial-real-estate-market-trends-and-outlook](https://www.nar.realtor/commercial-real-estate-market-trends-and-outlook/july-2019-commercial-real-estate-market-trends-and-outlook).

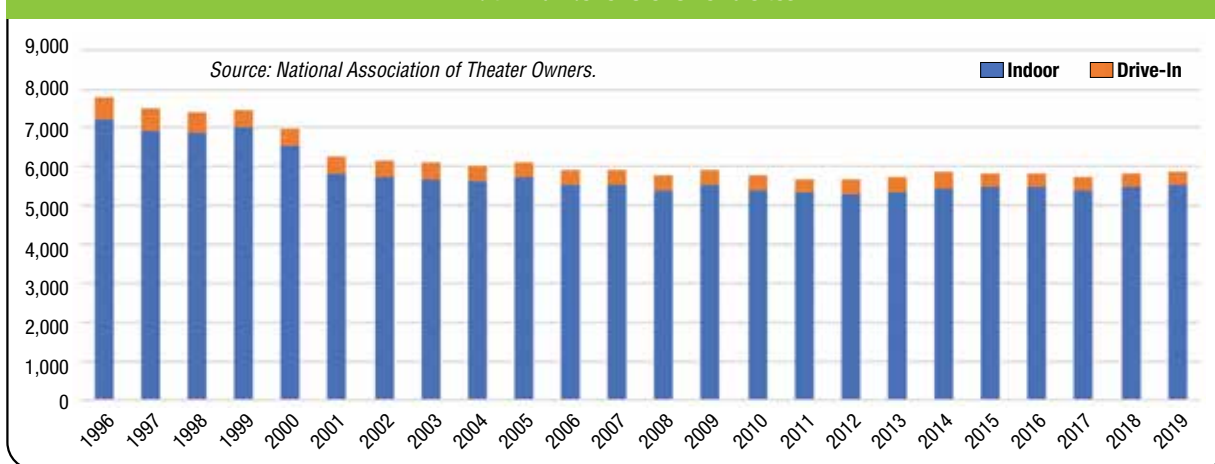
36 “Commercial Real Estate Outlook,” Nat’l Ass’n of Realtors (August 2013), available at [nar.realtor/sites/default/files/commercial-real-estate-outlook-2013-08.pdf](https://www.nar.realtor/sites/default/files/commercial-real-estate-outlook-2013-08.pdf); “Commercial Property Price Index,” Green Street Advisors (June 4, 2020), available at [greenstreetadvisors.com/insights/CPPI](https://www.greenstreetadvisors.com/insights/CPPI).

37 “Real Estate Loans: Commercial Real Estate Loans, All Commercial Banks,” Fed. Reserve Bank of St. Louis, available at [fred.stlouisfed.org/series/CREACBM027NB0G](https://fred.stlouisfed.org/series/CREACBM027NB0G).

Exhibit 5

AMC		
(in \$ Million)	2019	2018
Operating Income	136	265
Revenues	5,471	5,460
Pct.	2.50%	4.90%
Rent	967	798
Revenues	5,471	5,460
Pct.	17.70%	14.60%

Exhibit 4: Number of U.S. Cinema Sites



Retail was already evolving prior to the virus, but the pandemic has accelerated those changes and transformed the very nature of what is now economically possible for a large number of retailers, given a mandate to maintain the health of the nation. An omnichannel approach to retail, already a rapidly increasing requirement for retail success, is now the primary strategic option for many companies.

Recall that many players in the retail segment were struggling when unemployment was well below 5 percent. With a June 2020 unemployment rate in the U.S. of 11.1 percent and a mandate of addressing public safety, the fallout is likely to create sustained challenges for entire segments of the retail spectrum, rather than just individual companies.

Substantial collateral damage may also be inflicted on institutional lenders to the industry, about half of which in dol-

lar amount are the U.S. commercial banks. Another significant impact will be to holders of mortgage-backed securities, many of which are held in individual and group retirement funds.

However, many sectors within retail will continue to thrive, particularly those in the daily needs, convenience or “treasure hunt” sectors — so retail should not be painted with a single dark brush. Those sectors will need to continue to provide real customer convenience and experience, ease of execution through multiple product-fulfillment channels, and strong enterprise management. Retailers — and certainly restaurants, health clubs and theaters — will also need to provide customers with a safe environment and a strong sense of health security in order to keep them coming back consistently. Those that cannot meet these operating standards will continue to face monumental challenges at both the store and enterprise levels. **abi**

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COURT PROCEDURES AND PRACTICE TIPS

Judge David R. Jones

August 11, 2020

1) Contact with Court and Court Personnel.

- a) All requests for relief should be in the form of written motions filed with the Clerk of the Court. For procedural questions, such as scheduling, parties should contact the Court's case manager: Albert Alonzo by email at [Albert\\_Alonzo@txs.uscourts.gov](mailto:Albert_Alonzo@txs.uscourts.gov) or phone at (713) 250-5467 (office) or 832-993-7656 (mobile or text). If Mr. Alonzo is unavailable and an emergency exists, please contact Judge Jones' (i) courtroom deputy, Vriana Portillo by email at [Vriana\\_Portillo@txs.uscourts.gov](mailto:Vriana_Portillo@txs.uscourts.gov) or phone at (713) 250-5713 or (ii) law clerk, Jeannie Andresen by email at [Jeannie\\_Andresen@txs.uscourts.gov](mailto:Jeannie_Andresen@txs.uscourts.gov) or phone at (713) 250-5673.
- b) *Ex parte* contact with Judge Jones about pending cases is strictly prohibited. All communications about pending cases should be made on the record in open court. "Chambers' conferences" will not be conducted under any circumstances.
- c) At Judge Jones' direction, his staff may contact counsel as the need arises. If such contact is made, please refrain from engaging in discussions regarding legal matters which are not the subject of the call.

2) Obtaining Settings for Hearings.

**Unless otherwise specifically ordered, all hearings are evidentiary.**

- a) **Self-Calendaring.** Certain motions such as fee applications may (but are not required to) be self-calendared. When an eligible motion is filed in the Court's electronic filing system (CM/ECF), the system will prompt the filer for the date of a hearing. Only a date that is listed as an available date on the Court's website should be selected. You must select a date that is at least 25 days from the date that you file the motion. **All motions for relief from stay (§ 362) and objections to claims must be self-calendared for a hearing.** You must select a date that is designated as available in CM/ECF.
- b) **Settings by the Court.** If a pleading is filed for which self-calendaring is not available or if an eligible motion is not self-calendared, the Court will review the pleading and either rule on the motion or set a hearing. Objections should indicate whether a hearing is requested.

### 3) Pending Motions and Applications.

Motions will not ordinarily be considered until at least 25 days after filing. If the Court has not ruled on a motion within 30 days after filing, parties should contact the Court's case manager to inquire about the status of the motion. Applications to employ should comply with Bankruptcy Local Rules 2014-1, 9003-1 and 9013-1(e) and FED. R. BANKR. P. 6003. **Please note that Bankruptcy Local Rule 9013-1(b) does not apply to employment applications.**

After the expiration of one business day after a response deadline has passed, and with no response filed, counsel for the movant may file a Certificate of No Objection ("CNO"), stating that no objection/response was filed. By filing the CNO, counsel for the movant represents to the Court that the movant is unaware of any objection to the motion or application and that counsel has reviewed the Court's docket and no objection/response appears thereon. Upon receipt of the CNO, the Court may enter the order without further notice or hearing. Once the order is entered, the hearing scheduled on the motion is cancelled.

Objection(s) to a motion, application, objection to claim or other pleading filed with the Court may be resolved by filing an agreed form of order filed with a Certificate of Counsel ("CoC") consistent with this paragraph. The CoC must be signed by counsel with a certification that all known objections have been resolved by the agreed form of order. A CoC should not be filed if it resolves less than all filed objections. If there is an applicable objection deadline, the CoC may not be filed until twenty-four (24) hours after that deadline. Upon receipt of the CoC, the Court may enter the order attached to the CoC without further notice or hearing.

**Every motion, CNO and CoC should include a proposed form of order.** Proposed orders should be filed as a separate attachment and have no cover page. Proposed orders should also attach copies of any referenced exhibits. Any CNO or CoC that includes a proposed form of order that varies from the original proposed order must include (a) a redline of the revised form of order against the order filed with the subject motion and (b) a clean copy of the form of order without a cover page.

### 4) Emergency Motions.

Emergency motions should be filed using the CM/ECF event code for an "emergency motion." **When filing an emergency motion, please identify the date by which emergency relief is needed just below the language required by Local Bankruptcy Rule 9013-1(b) and include a short explanation of the nature of the emergency. The Court strongly urges movants seeking emergency relief to notify the Court's case manager upon the filing of the motion.**

### 5) Expedited Motions.

Motions that are not emergency motions but which require consideration prior to the standard 21-day response time may be styled as an "Expedited Motion." Expedited motions should be filed using the "Expedited" CM/ECF event code. **When filing an expedited motion, (i) please identify the date by which expedited relief is needed just below the language**

required by Local Bankruptcy Rule 9013-1(b); and (ii) include an explanation in the body of the motion setting forth why expedited consideration is required and the harm that will be suffered if expedited relief is not obtained. **The Court strongly urges movants seeking expedited relief to notify the Court's case manager upon the filing of the motion.**

6) **Continuances.**

A continuance may only be requested by motion. Parties are requested to contact the Court's case manager as soon as the motion is filed. All motions for a continuance should concisely state the reason a continuance is being requested; whether the continuance is agreed; and the amount of additional time that is needed. Until a motion for continuance is granted, all parties should assume that no continuance will occur.

7) **Extensions of Deadlines.**

If the parties wish to modify deadlines that do not impact the Court's calendar, such as extensions of discovery deadlines or the date for filing an answer in an adversary proceeding prior to an initial scheduling conference, the parties may agree among themselves to such extensions without the necessity of a court order so long as the agreement is embodied in a writing (such as a stipulation) filed with the Court. All other extensions, such as a party's deadline to respond to a pending motion, or a request to change a hearing date, require a written motion and order from the Court.

8) **Video/Telephonic Participation.**

- a) Counsel are permitted to participate in hearings by video/telephone without prior permission of the Court.
- b) Witnesses may not be examined nor evidence offered by telephone/video, except in emergency situations in which the Court determines sufficient cause exists to waive the prohibition.
- c) **The Court's dial-in line is live.** Do not use a speakerphone when addressing the court. When not speaking, parties should mute their line. Parties participating by phone must assure that no background noise is transmitted, including music, typing and third-party conversations, etc. **Parties are encouraged to use a headset/earphones.**
- d) The following dial-in instructions should be used:

The dial-in number is **832-917-1510**. You will be responsible for your own long-distance charges. You will be asked to key in the conference room number. Judge Jones' conference room number is **205691**.

Once the code is entered, you will be connected live to the courtroom. You will be able to hear persons speaking in the courtroom and other persons on the call addressing the Court. You will be able to address the Court directly. The Court will

hear all sound on your line. **PLEASE mute your line if you are not addressing the Court.**

If there are multiple parties on the call, the Court may activate the “hand raise” feature. The system will announce that this feature has been activated. If the hand raise feature has been activated, you will not be able to address the Court until the Court addresses you or you request to speak and the Court grants the request. If you wish to address the Court, you must press 5\*. Within 5 seconds, the Court will receive a signal that you wish to speak. When the Court calls on you, you will hear a recorded message that you have been recognized. When you are done, the Court will again mute your call.

Details regarding the use of the conferencing system are available at <https://www.conferencecalling.com/help>

- e) Video participation is available via GoToMeeting. To use GoToMeeting, the Court recommends that you download the free GoToMeeting application prior to the hearing. If a browser connection is used, Chrome is generally recommended. A mobile version of the application is also available. The meeting code is “judgejones”. You may also connect directly by clicking the link on Judge Jones’ home page on the Southern District of Texas website. Once connected, click the settings icon in the upper right corner and enter your name under the personal information setting.
- f) Audio recordings of all non-chapter 13 panel hearings will normally be available on CM/ECF using CourtSpeak. The audio file will be reflected on the docket as an .mp3 filed embedded within a .pdf document. The .pdf file will contain basic instructions for accessing the audio file.

#### 9) **Discovery Disputes.**

Discovery disputes that cannot be resolved between the parties should ordinarily be submitted by written motion. However, if a dispute arises during an oral deposition or Rule 2004 examination, a party may contact the Court’s case manager during the questioning and request a telephonic hearing with the Court.

#### 10) **Settlements.**

- a) If a matter is settled, please immediately contact the Court’s case manager so that the Court may readjust court resources accordingly.
- b) If reduced to writing and signed by all parties prior to a scheduled hearing/trial, a proposed settlement should be filed with the Clerk of the Court. If the proposed settlement has been filed, then only one counsel is required to attend the scheduled hearing/trial, though all interested parties are invited to attend. Telephonic attendance is permitted under this paragraph.
- c) If a proposed settlement has not been reduced to writing and signed by all parties prior to a scheduled hearing, all parties must appear and announce the terms of the settlement into

the record. Once the terms of a settlement are announced, the Court will consider the parties bound by the agreement subject only to court approval as required.

- d) If a settlement requires approval pursuant to Federal Rule of Bankruptcy Procedure 9019, **a motion seeking approval of the settlement should be filed in the main bankruptcy case only.** Along with the motion, parties should submit a proposed form of order approving the settlement in the main case and a proposed form of judgment or dismissal order in the adversary proceeding (if applicable).

**11) Courtesy Copies.**

The Court does not need to receive copies of documents that have been electronically filed with the Clerk of the Court via CM/ECF.

In chapter 9 and 11 cases, parties are requested to submit proposed confirmation orders in MS Word format to the Court's case manager at least 24 hours prior to the scheduled confirmation hearing.

**12) Courtroom Technology.**

All courtrooms are equipped with technology that will allow parties to broadcast exhibits and other documents to opposing parties, witnesses and the Court from the display output on most laptop computers and tablets or via wifi using GoToMeeting. Judge Jones' Houston courtroom is also equipped with AirMedia technology to allow wireless connection to the broadcasting system.

**13) Wireless.**

The courtroom is equipped with wireless access to the internet. The wireless connection is "Jones\_Crt\_AW". The network key is djones\_crt.

**14) Exhibits.**

- a) All hard copy exhibits should be clearly marked, tabbed and bound in a 3-ring notebook or another binding method that allows the exhibit book to be opened and lay flat on an even surface. In addition to copies for opposing parties, counsel should bring two hard copies of the exhibits to the scheduled hearing or trial—one for the Court and one for witnesses.
- b) The Court will strictly enforce Bankruptcy Local Rule 9013-2. **Unless otherwise specifically ordered or stated in the Local Rules, all hearings are evidentiary.**

**15) Corpus Christi and Laredo.**

Judge Jones holds hearings in Corpus Christi and Laredo. Hearing dates in each division will be published on Judge Jones' home page. If parties in these divisions require expedited or emergency relief, they should contact the Court's case manager for an alternative setting.

**16) Conditional Approval of Disclosure Statements in Certain Chapter 11 Cases.**

Under appropriate circumstances, the Court will consider motions for expedited approval of a disclosure statement. The Court will also consider motions requesting conditional approval of a disclosure statement in all chapter 11 cases.

**17) Fee Applications.**

**a) Fee Applications in cases under chapters 7, 9, 11, 12 and 15**

Applications for compensation and reimbursement in cases under chapters 7, 9, 11, 12 and 15 must contain a summary table on the first page of the application. A sample document for chapter 11 in Word format containing the table is available on the Court's website. In addition, all applications shall (i) include a narrative description of the services performed and the benefits of those services; (ii) address the factors set forth in 11 U.S.C. § 330(a)(3); and (iii) attach copies of all fee statements and a proposed form of order.

**b) Fee Applications in cases under chapter 13.**

Pursuant to the local rules on fee applications, approved *fixed fee applications* do not require the filing of subsequent applications. Otherwise, applications for compensation and reimbursement in cases under chapter 13 shall contain a summary table beginning on the first page of the application. A Word document containing the table is available on the Court's website. In addition, all applications shall (i) include a narrative description of the services performed and the benefits of those services; and (ii) attach copies of all fee statements and a proposed form of order.

The proposed order shall, at a minimum, contain the following paragraph:

It is ordered that [name of applicant], is awarded fees and costs as an administrative expense for the period \_\_\_\_\_ through \_\_\_\_\_ as follows:

Fees: \$ \_\_\_\_\_

Expenses: \$ \_\_\_\_\_

Total: \$ \_\_\_\_\_

[Name of applicant] is authorized to apply its retainer in the amount of \$ \_\_\_\_\_ against the awarded compensation.



# Faculty

**Jennifer C. Hagle** is a transactional bankruptcy lawyer with Sidley Austin LLP in Los Angeles and has over 30 years of experience representing clients in bankruptcy and out-of-court restructurings. Her practice principally focuses on representing holders of senior secured, mezzanine and subordinated debt in both public and private middle-market and large cap deals. Her clients include banks, hedge funds and other financial institutions in a wide range of industries, including aviation, media, clean energy (ethanol and biofuels), coal and natural gas, technology, internet gaming, retail and restaurants, health care, hospitality, real estate and for-profit higher education. Ms. Hagle also has significant experience in the area of corporate finance, having represented a number of lenders and borrowers with respect to loan originations and merger and acquisition transactions in nondistressed deals. In 2017, she was named a Fellow of the American College of Commercial Finance Lawyers (ACCFL), and the American College of Bankruptcy named her as a Fellow of its 2015 class and as a regent for the Ninth Circuit in 2020. She is also a contributing author of *Collier's Bankruptcy Practice Guide*. Ms. Hagle's work has been recognized in *Chambers USA: Bankruptcy/Restructuring – California* (2008-20), *Who's Who Legal: Restructuring and Insolvency* (2016-20), *The Best Lawyers in America* (2013-20), *Southern California Super Lawyers* (2012-20) and *Southern California's Best Lawyers* (2019). She received her B.A. from UCLA in 1983 and her J.D. from the University of California, Hastings College of Law in 1987.

**Hon. David R. Jones** is a U.S. Bankruptcy Judge for the Southern District of Texas in Houston, sworn in on Sept. 30, 2011. Prior to becoming a judge, he was a practicing lawyer in Houston for approximately 19 years specializing in bankruptcy and bankruptcy-related litigation. Judge Jones received his B.S. in electrical engineering from Duke University in 1983, his M.B.A. from Southern Methodist University in 1986, and his J.D. from the University of Houston in 1992, where he served as editor-in-chief of the *Houston Law Review*.

**Prof. Troy A. McKenzie** is professor of law at New York University School of Law in New York, and his scholarly interests include bankruptcy, civil procedure and the federal courts. From 2015-17, he took a leave of absence from NYU to serve as deputy assistant attorney general in the Office of Legal Counsel at the U.S. Department of Justice. From 2011-15, he served as assistant reporter to the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States. He is a member of the National Bankruptcy Conference and the Council of the American Law Institute. Before his academic career, Prof. McKenzie was a litigation associate in the New York office of Debevoise & Plimpton. After receiving his law degree from NYU, he clerked for Hon. Pierre N. Leval of the U.S. Court of Appeals for the Second Circuit and for Justice John Paul Stevens of the U.S. Supreme Court. Prof. McKenzie holds an undergraduate degree in chemical engineering from Princeton University.

**James H.M. Sprayregen** is a restructuring partner in the Chicago and New York offices of Kirkland & Ellis LLP and served on Kirkland's worldwide management committee from 2003-06 and 2009-19. He is recognized as one of the outstanding restructuring lawyers in the U.S. and around the world, and he has led some of the most complex chapter 11 filings in recent history. He has represented major U.S. and international companies in restructurings out of court and in court around the globe, and has handled matters for clients in industries as varied as manufacturing, technology, transporta-

tion, energy, media, retail and real estate. In addition, he has experience advising boards of directors and generally representing debtors and creditors in complex workout, insolvency, restructuring and bankruptcy-planning matters worldwide. He is listed in *Chambers & Partners* and in March 2010 was selected by *The National Law Journal* as one of “The Decade’s Most Influential Lawyers.” Mr. Sprayregen was named “Global Insolvency & Restructuring Lawyer of the Year” in 2013 by *Who’s Who Legal Awards*, and in October 2013, he was inducted into the Turnaround Management Association (TMA) Turnaround, Restructuring, and Distressed Investing Industry Hall of Fame. From 2013-15, he was appointed to serve a two-year term as the president of INSOL International. Mr. Sprayregen has led bankruptcy cases for numerous companies, including United Airlines, Consecro, General Growth Properties, Energy Future Holdings Corp., Caesars Entertainment Operating Co., Seadrill, iHeartMedia, Inc., Avaya, Japan Airlines Corp. as U.S. and international counsel, LINN Energy, SandRidge Energy, The Great Atlantic & Pacific Tea Co., Edison Mission Energy, Hawker Beechcraft Inc., Cengage Learning, Inc., Visteon Corp., Lear Corp., The Reader’s Digest Association, Corus Bankshares, Inc., Majestic Star Casino LLC and ION Media Networks, Inc. He joined Kirkland in 1990 and built its international Restructuring Group, then joined Goldman Sachs in 2006, where he was co-head of Goldman Sachs’ Restructuring Group and advised clients in restructuring and distressed situations. He rejoined Kirkland three years later. Mr. Sprayregen is a frequent lecturer, speaker and writer on insolvency, cross-border and distressed M&A issues. He has served as an adjunct professor at the University of Chicago Booth School of Business, New York University School of Law and the University of Pennsylvania Law School. Mr. Sprayregen received his J.D. in 1985 from the University of Illinois.