AMERICAN BANKRUPTCY INSTITUTE

2021 Virtual Annual Spring Meeting

Politics, the Economy and Insolvency: Updates from D.C.

Sponsored by Nelson Mullins Riley & Scarborough LLP and Squire Patton Boggs

Media Sponsor: Bloomberg Law

Aaron Cutler
Hogan Lovells; Washington, D.C.

Karol K. Denniston
Squire Patton Boggs; San Francisco

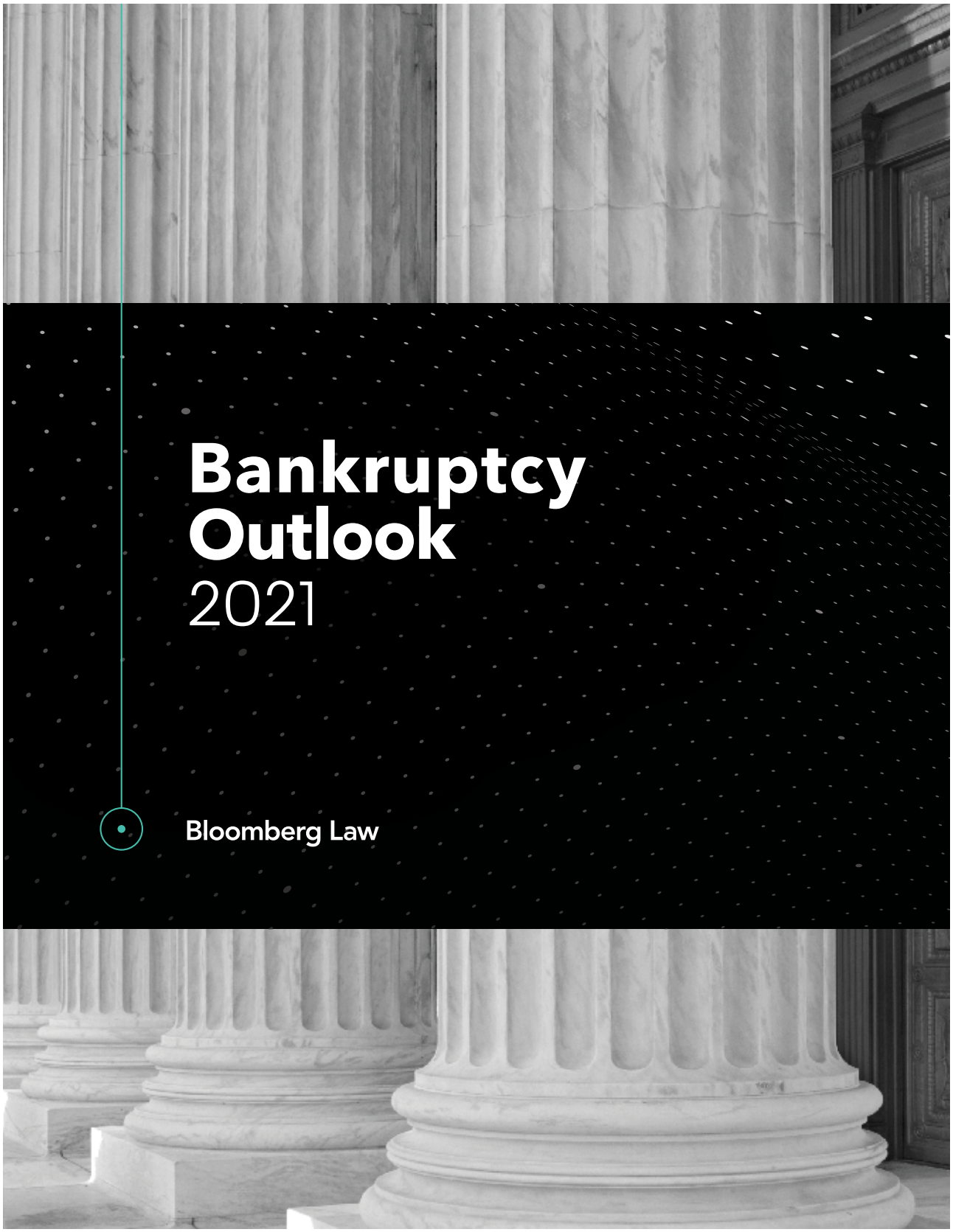
Jim Moran
Nelson Mullins Riley & Scarborough LLP; Washington, D.C.

Teadra Pugh
Bloomberg Law; Charlotte, N.C.

Bill Shuster
Squire Patton Boggs; Washington, D.C.

PLENARY SESSION

2021


Bankruptcy
Outlook
2021
Bloomberg Law

2021 Outlook on Bankruptcy

As the first global pandemic in over a century played out in 2020, the social and economic disruption that arose roiled the markets and devastated industries from hospitality to travel to retail.

As unemployment numbers soared and businesses struggled to survive month to month in a depressed economy, commercial bankruptcies rose.

The **2021 Outlook on Bankruptcy** provides news, detailed analysis, and timesaving Practical Guidance to help you understand the current bankruptcy landscape. From analysis of the latest filing trends to provisions in pandemic-related aid packages, the outlook prepares you for the year ahead.

The **Bloomberg Law Bankruptcy Practice Center** provides sound, reliable guidance with integrated analysis, news, case law, dockets, Practical Guidance, and renowned Bloomberg business information in an all-encompassing resource. From the searchable, easily organized Bloomberg Law: Bankruptcy Treatise – containing more than 620 chapters written by over 60 expert authors, to step-by-step Practical Guidance including forms, checklists, and more, Bloomberg Law helps you navigate this growing area of law.

Recently added content includes Practical Guidance dedicated to Chapter 13 Bankruptcy and Voluntary Chapter 11 Bankruptcy. Chapter 13 coverage guides practitioners through the process of planning for and filing the Chapter 13 bankruptcy petition and related documents. Chapter 11 coverage guides practitioners through the stages of filing an individual or non-individual voluntary Chapter 11 bankruptcy. Both the Chapter 13 and Chapter 11 coverage provide broad subject overviews as well as detailed annotations to help you complete the schedules and forms.

Request your demo today.

2021 Commercial Real Estate Bankruptcy Survey

The pandemic has caused serious disruption in the world of commercial real estate. These financial disruptions affect a wide array of parties. Share your experiences with us by participating in Bloomberg Law's 2021 Commercial Real Estate Bankruptcy Survey. We are interested in hearing from you!

Participate now.

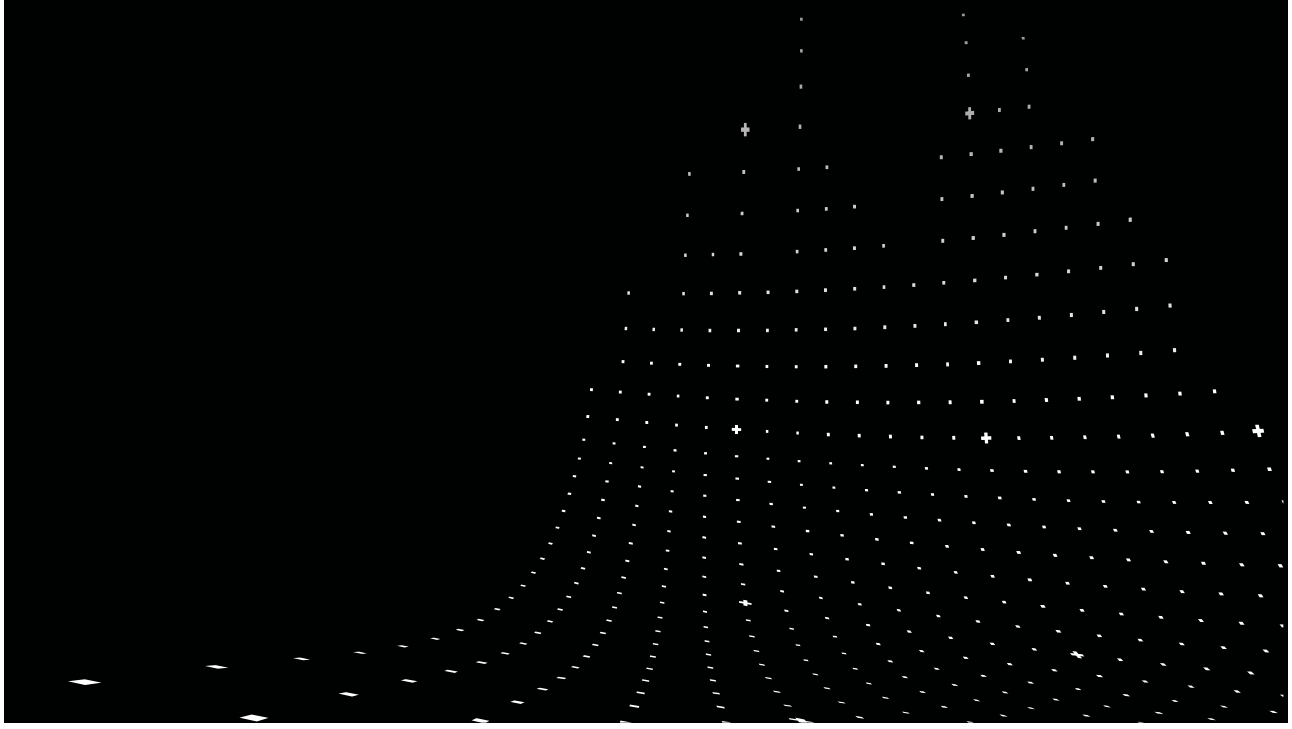


Table of Contents

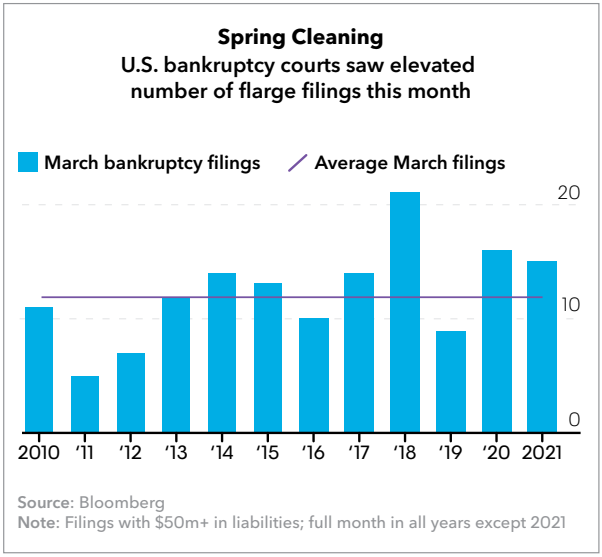
U.S. Bankruptcy Tracker: March Heats Up for Busted Companies

By Jeremy Hill
Staff Correspondent, Bloomberg News

March 23, 2021

U.S. bankruptcy courts welcomed a familiar cast of characters last week as two oil drillers, a Texas electricity provider and a real estate developer sought protection from creditors.

Already this month 15 firms with at least $50 million of liabilities have filed for bankruptcy, compared with 16 in all of March 2020, according to data compiled by Bloomberg. That's more than the average of 12 for the third month of the year over the last decade and on pace to exceed the 21 filings of March 2018, which was the most since 2009.



Last week's five large filings pushed the year's haul to 41 through March 21, neck-and-neck with the 2020 pace, according to data compiled by Bloomberg.

Many of this year's filings are speedy debt-for-equity swaps, in which lenders take over a busted business, said Eric Snyder, chairman of the bankruptcy practice at law firm Wilk Auslander. Government stimulus, freely available debt capital and eviction moratoriums have kept a lid on other types of bankruptcy, he said in an interview.

"Anyone can buy their way out of trouble," Snyder said. "There's just no reason to file for bankruptcy" unless lenders force the issue, as is happening in the energy and retail sectors, he said.

Gas driller Nine Point Energy Holdings Inc. filed last week with a tentative deal to hand ownership to lenders. Highpoint Resources Corp., also a driller, entered and exited bankruptcy after winning court approval for a plan to sell itself to Bonanza Creek Energy Inc.

Brilliant Energy LLC, an electricity retailer, became the latest corporate victim of the Texas freeze and the first to head straight to a Chapter 7 liquidation. Unlike in the case of Brazos Electric Power Cooperative, Brilliant isn't stiffing the state grid operator through bankruptcy -- it instead owes some $60 million to a trading unit of DTE Energy Co.

Elsewhere, the owner of a residential development in the Greenpoint neighborhood of Brooklyn, New York filed for Chapter 11. Dupont Street Developers LLC listed $57.1 million of assets and $58.9 million of liabilities in its petition.

Distress Creeps Lower

The amount of traded distressed bonds and loans fell to about $93 billion as of March 19 -- down 1.6% week-on-week. The amount of troubled bonds slid 0.5% while distressed loans dropped 4.6%.

There were 267 distressed bonds from 139 issuers trading as of Monday, according to Trace data. That's up from the prior week's 257 bonds from 133 issuers, but far below the 1,896 troubled bonds at the March 23 peak.

Diamond Sports Group LLC had the most distressed debt of issuers that hadn't filed for bankruptcy as of March 19, Bloomberg data show.

Click here for more news on distressed debt and bankruptcy. First Word is curated by Bloomberg editors to give you actionable news from Bloomberg and select sources, including Dow Jones and Twitter. First Word can be customized to your Worksheet, sectors, geography or other criteria by clicking into Actions on the toolbar or hitting the HELP key for assistance.

With assistance from Jenny Sanchez and Anik Chattopadhyay.

Landlord Protections Give Bankruptcy-Preventing Deals a Boost

By Alex Wolf
Bloomberg News

March 29, 2021

Commercial landlords have a greater incentive to grant rent deferrals to struggling brick-and-mortar businesses following a temporary rule change that prevents bankrupt tenants from clawing back rent payments made under those deals.

Bankruptcy law allows debtors to sue to get back certain "preferential" payments they made in the 90-day period before the bankruptcy was filed. But the latest rule change, part of the $2.3 billion stimulus package Congress passed in late December, blocks bankrupt tenants from such lawsuits to recoup rents paid in a deferred rent agreement they struck with their landlords within the 90-day period.

The change expires in December 2022. But without it, retailers, restaurants, movie theaters, and other commercial tenants that received a break from landlords during the pandemic could try to get their rent back after filing for bankruptcy, said attorney Ivan Gold of Allen Matkins Leck Gamble Mallory & Natsis LLP.

"No good deed goes unpunished," he said. "This was to facilitate agreements so that people wouldn't go bankrupt."

With thousands of commercial leases being restructured as a result of the pandemic, the temporary change "opens the door for landlords and tenants to work together," said B. Riley Real Estate LLC President Michael Jerbich, who advised companies like J.C. Penney Co. and Sears Holdings Corp.

Congress focused on large landlords such as mall and shopping center owners, but the new law also benefits distressed tenants by encouraging more leniency toward rent.

"I think that these provisions are meant to help debtors more than anything," said attorney Fred Ringel of Robinson Brog Leinwand Greene Genovese & Gluck PC. "There might be a bankruptcy avoided because of it."

'Preferential Transfers'

The bankruptcy code normally allows debtors to sue over "preferential transfers" they made in the 90 days before bankruptcy that weren't in the "ordinary course of business," which includes payments under rent deferral agreements.

Such payments can be seen as debtors preferring the landlord's debt over other creditors, who are instead forced to pursue their pre-bankruptcy claims through the court process.

Credible lawsuits against landlords to claw back preference payments are "fairly rare," but they do happen, said bankruptcy attorney Robert LeHane of Kelley Drye & Warren LLP. And they typically settle at around 50 cents on the dollar, he said.

At the start of the pandemic a year ago, Gold was bombarded with calls from commercial landlords concerned about the risks of entering into rent deferral agreements with businesses that were shut down indefinitely.

"That's all anyone was talking about that week," said Gold, who specializes in real estate-related litigation.

LeHane encouraged his landlord clients to make deferred rent deals during the pandemic, but he also warned them of their potential legal exposure.

Targeted Relief

Last year, Gold partnered with the International Council of Shopping Centers, a retail property trade association, to craft bill language that ultimately became part of the bankruptcy code revision. The billlater was packaged with other amendments targeted specifically at Covid-19's impact on landlords and tenants.

The stimulus measure also gives bankrupt companies more time to decide whether to keep or reject commercial leases. Small businesses in Chapter 11 can also seek to defer rent payments for up to 120 days.

These changes, like the clawback provision, also expire in December 2022.

"When you look at it in its totality, it was a very balanced approach for landlords as well as tenants," said Betsy Laird, an ICSC senior vice president. The law should help tenants and landlords "ride out this storm," she said.

Threat of Another Lost Summer Stirs Airline Cash-Flow Fears

By Christopher Jasper, Siddharth Philip and Tara Patel
Bloomberg News

March 26, 2021

The latest setbacks to the return of air travel are stoking concern that a cash crunch is about to bear down on the airline industry.

A second summer lost to the coronavirus crisis would likely trigger a spate of airline failures and bankruptcy filings, alongside a repeat of 2020's bailouts, job cuts, and jetliner deferrals and cancellations, according consultants IBA Group.

In just the past week, the optimism that took the Bloomberg World Airlines Index to the highest since the start of the pandemic has evaporated.

TUI AG, the world's biggest tour operator, scaled back its summer schedule to reflect a peak season that won't start until July, at least two months later than normal. Ryanair Holdings Plc held a press briefing to reassure would-be holidaymakers they could change flights for free and exhorted them not to be "panicked" by negative headlines.

"The ground is shifting from one day to the next," IBA's Stuart Hatcher said in an interview. Governments are aware that pushing back the reopening of travel will mean more pain for the aviation industry but have been spooked by resurgent infection rates even as vaccine rollouts continue, he said.

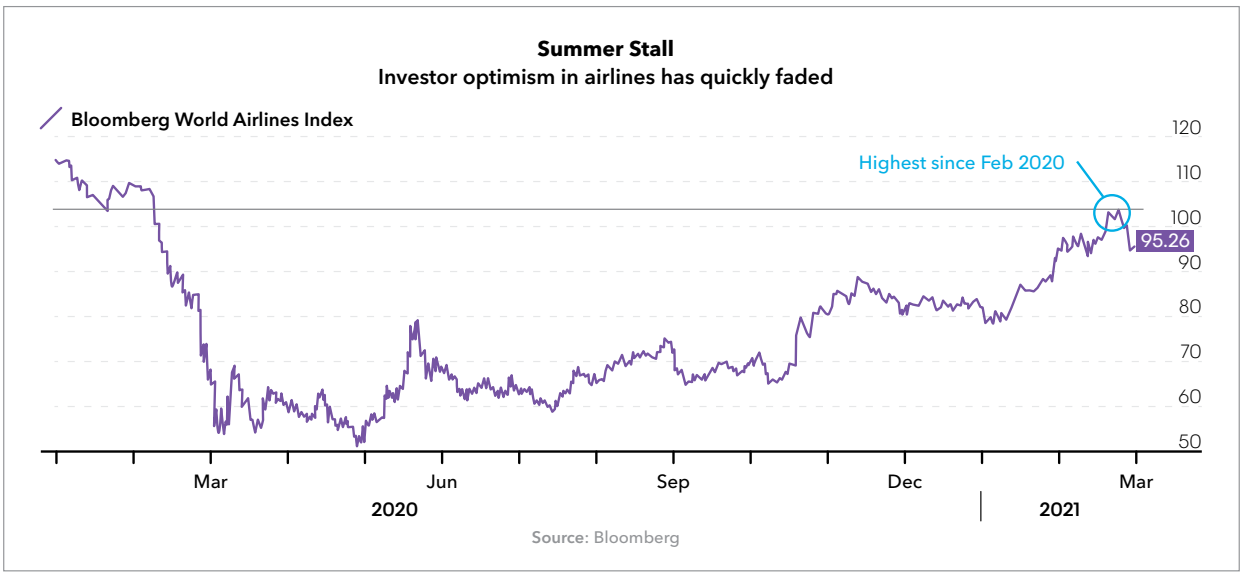
European carriers especially have felt the gloom that's set in because of rising cases and fresh lockdowns. Leisure-focused companies such as TUI and Ryanair usually use the first three months of the year taking summer bookings, giving them a cash stockpile to work with as they gear up operations.

Any wiggle room is swiftly contracting. TUI, which caters to German and British travelers who flood to the Mediterranean during the warmer months, said Thursday it has enough liquidity to last "until the summer," without being more specific. British Airways owner IAG SA secured a new loan using its coveted takeoff and landing slots at London Heathrow airport as collateral.

July or Bust

Travel needs to restart in earnest by July 1 or carriers risk missing out on the handful of months that will provide the bulk of annual earnings, Air France-KLM Chief Executive Officer Ben Smith said Thursday.

"What's critical about July is that Q3, for the majority of European carriers, is the key quarter to make it through the year," Smith said in a briefing held by the Airlines for Europe lobby. The group is pushing for the rapid adoption of so-called vaccine passports and an end to quarantines it says crush demand.



While 45 airlines failed in 2020, many more have been hanging on in hopes of an imminent revival of leisure markets, Hatcher said. That's looking less likely as the year develops, with Airports Council International on Thursday forecasting global passenger traffic will remain almost 50% below usual levels this year.

While most carriers could survive a delayed summer, the cost to bail them out would be considerable. Even before the latest setbacks, the International Air Transport Association said carriers would need as much as $80 billion more in government money this year.

More Bailouts

In Europe, Air France-KLM is seeking further aid on top of 10.4 billion euros ($12 billion) in loans and guarantees granted last year. TUI, which has taken 4.8 billion euros in German government aid, gave no financial forecast at its annual meeting on Thursday, promising only that cash flow will trend toward breakeven as business normalizes.

The airport sector will also need state support, the ACI group said, warning that even large hubs are struggling. The industry is "in a precarious situation right now," the trade association's economist Patrick Lucas said.

Discount carriers such as Ryanair, EasyJet Plc and Wizz Air Holdings Plc have strong liquidity positions and easy options for boosting reserves through aircraft sale-and-leaseback deals if necessary.

There could also be an extension of $50 billion of Cares Act loans and worker payments in the U.S. and a similar continuation of furloughs in Europe and elsewhere. Even then, airlines may need to deepen cost cuts.

More carriers are likely to pursue local bankruptcy protection where that's possible, following companies like Norwegian Air Shuttle ASA and Virgin Atlantic Airways Ltd.

Major Latin American carriers including Latam Airlines Group SA, Avianca Holdings SA and Grupo Aeromexico SAB that secured U.S. Chapter 11 protection for their main businesses in the absence of state bailouts at home are likely to seek extensions if cash flows fail to revive, Hatcher said.

Bloated Orders

IBA anticipates moves to rationalize supply in Asia, where aircraft order books remain bloated, especially in Southeast Asia and India, and airline failures have been limited. Mergers like that between Korean Air Lines Co.'s and national rival Asiana Airlines Inc. may become more common.

A cash crunch will have further implications for airline fleet plans, prompting the retirement of more older planes and extended deferrals of new deliveries. Outright order cancellations would become more likely at Airbus SE and Boeing Co.

Airlines and travel firms are now waiting for U.K. Prime Minister Boris Johnson to deliver his verdict on reopening travel from Britain in an update set for April 5. A targeted date of May 17 is expected to be pushed back.

"The market is there, the customers want to travel," said Fritz Joussen, TUI's CEO. "However, the conditions for tourism need to be created at the political level."

With assistance from Charlotte Ryan.

ANALYSIS:

Landlords, Remember: 'It's the Thought That Counts'

By Teadra Pugh and Jeffrey P. Fuller
Legal Analysts, Bloomberg Law

January 11, 2021

In April 2020, the federal government and other jurisdictions announced moratoria on evictions from rental properties, but offered no financial assistance for unpaid landlords. Since then, many landlords have rightly lamented, "What about us?"

Then, just before Christmas, the Consolidated Appropriations Act of 2021 (CAA 2021) was signed into law, with several lease- and rent-related bankruptcy amendments. While the amendments appear to provide a small salve for commercial landlords, they extend the post-petition limbo for landlords of non-residential properties. The CAA 2021 will leave many landlords with bankrupt tenants still wondering "What about us?"

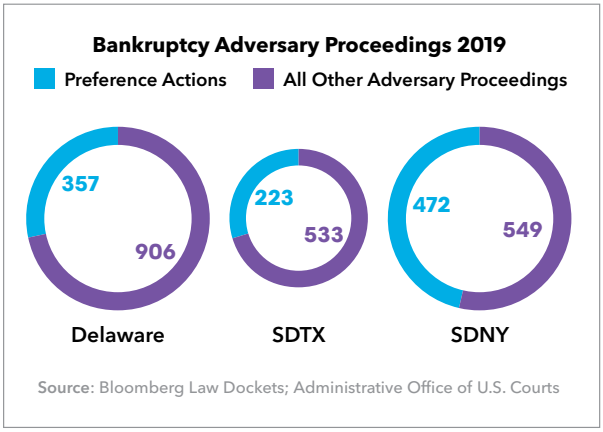
A Christmas Gift of Preference Defense

In bankruptcy, a trustee or debtor may avoid, or claw back, payments the debtor made before filing bankruptcy. Among other requirements, this avoidance power is limited to payments made in the 90-day (or one-year for insiders) period preceding the bankruptcy on an antecedent, or pre-existing, debt in excess of $6,825. These preference actions are fairly common in bankruptcy. Of the 1,263 adversary proceedings, or bankruptcy lawsuits, filed with the Bankruptcy Court for the District of Delaware in 2019, 72% were preference actions. Similarly, a sizeable percentage of adversary proceedings in the Southern District of New York (54%) and Southern District of Texas (29%), the two next most popular venues for commercial bankruptcies, also were preference cases.

The CAA 2021 amendments specifically exempt certain "covered payments of rental arrearages" from clawback as preferential transfers as long as the amounts are, essentially, for non-residential property rents, deferred on or after March 13, 2020, and do not exceed the amount of rents due under the lease prior to that date.

A Beautifully Wrapped But Empty Box?

At first blush, this appears to be a boon for long-suffering landlords. Landlords could, theoretically, be paid in full and narrowly escape avoidance by invoking this new affirmative defense. In reality, however, landlords are rarely targeted for avoidance of preferential transfers. Nationwide, there have been fewer than 20 adversary proceedings filed over the past decade to claw back preferential payments related to commercial rent payments, and those were almost exclusively filed in Chapter 7 cases.



Source: Bloomberg Law Dockets; Administrative Office of U.S. Courts

There could be several reasons for the disproportionately small number of preference actions involving rents. First, some tenant-debtors prioritize rent even in times of distress, and timely rent payments would not qualify as preferential transfers. Also, bankruptcy offers a unique benefit to tenants: the ability to assume or reject unexpired leases. Tenants of commercial property are usually sophisticated enough to ascertain the feasibility of assuming or rejecting a lease prior to filing bankruptcy. Most of these tenant-debtors who expect to reject a lease are not going to pay months of back rents on the eve of bankruptcy; therefore, these unpaid landlords have no preference exposure. For landlords of tenant-debtors who are behind on rent but plan to assume the lease, there is the "Kiwi Defense," which provides that unsecured creditors whose claims are paid in full, post-petition and with proper court authorization (e.g. lease assumption), may not then be pursued for preferential transfers. Hence, if a debtor pays a landlord for past-due rents on the eve of bankruptcy and then assumes the lease, the landlord will still likely have no preference exposure.

As a result, there are few realistic scenarios wherein landlords would even have the opportunity to invoke CAA 2021's new preference defense.

The new preference defense also comes with limitations. The covered payment cannot exceed amounts that would ordinarily be due under the lease as it existed before March 13, 2020. Moreover, the "covered payment" cannot include "fees, penalties and interest" over and above what would normally be due under the lease if the debtor was paying on time. Accordingly, if the landlord charged the tenant anything extra for deferring rent, those charges are vulnerable to clawback.

And a Lump of Coal, Too?!

While the new CAA 2021 amendment to preferential transfers will likely have limited value for commercial landlords, other bankruptcy amendments actually extend landlord misery with delinquent, non-paying tenants.

Debtors filing Chapter 11 pursuant to subchapter V now have an additional 60 days, for a total of 120, to pay post-petition rent, and nonresidential tenants in all cases have an additional 90 days to assume or reject the lease. Congress probably extended these deadlines in order to give bankrupt small businesses more time to reorganize. However, for landlords who have also been struggling to pay mortgages and maintain properties during the pandemic, these extensions exacerbate that problem by preventing the landlord from filling that space with a reliably paying tenant.

Only time will reveal the true utility of the amendments. Perhaps there are not as many would-be tenants beating down the doors to occupy nonresidential spaces, and the landlords will benefit from debtors having more time to make good on the rent. The predicted "eviction tsunami" may materialize and result in an increase of preference actions targeted at landlords and payments of past-due rents, and many landlords will be able to shield themselves with this new affirmative defense.

But at this point, we just do not find these CAA 2021 bankruptcy amendments to be nearly as beneficial for the targeted demographic as, for example, the CARES Act subchapter V amendments. How landlords fare under these changes will be a trend to watch until the amendments expire in two years.

Bloomberg Law subscribers can find related content on our Comparison Table -Temporary Pandemic-Related Bankruptcy Code Provisions.

ANALYSIS:

Big Chapter 11 Cases Find Hospitality in Texas Court

By Jeffrey P. Fuller
Legal Analyst, Bloomberg Law

December 11, 2020

The Bankruptcy Court for the Southern District of Texas (SDTX) has been experiencing a bankruptcy boom. The district, which includes the Houston metropolitan area, has experienced a notable increase in major Chapter 11 bankruptcy case filings (generally more than $100m in assets) over the last four years—especially this year.

Since 2016, SDTX has steadily and intentionally developed a reputation for efficient, skilled, and predictable handling of large Chapter 11 bankruptcy cases. This year, SDTX further cemented its role as a magnet court for these cases.

Historically, the bankruptcy courts of Delaware and the Southern District of New York (SDNY) have been considered the preferred jurisdictions for filing major Chapter 11 bankruptcy cases. They have earned a reputation among the bankruptcy bar for their handling of large and complex cases. Combined, these courts typically host nearly half of all these cases filed in any given year.

When a business entity files Chapter 11, it often commences cases for all or most of its subsidiaries at the same time. These are typically jointly administered under one case, often referred to as the "main case." For the purposes of my analysis, a group of jointly administered cases—no matter the number of subsidiary filings—is counted as a single case.

Choosing a Venue

A would-be debtor has some venue options over where it can file a case under federal statute. Pursuant to 28 U.S.C. § 1408, a business entity can typically file a bankruptcy case in its state of incorporation, the location of its "principal place of business," the location of its "principal assets," or wherever an affiliate has a pending bankruptcy case. Because large companies frequently incorporate in Delaware (or at least have some affiliate that does) or have some presence in New York City, they often reorganize in Delaware or SDNY.

Companies headquartered in other parts of the country, sometimes with little connection to Delaware or New York, have sought to reorganize in these courts—often to the dismay of creditors, employees and other parties affected by the filing. This also doesn't sit well with bankruptcy attorneys who don't practice in New York City or Wilmington. One notable case that raised an outcry over choice of venue was the handling of Houston-based Enron's bankruptcy in SDNY instead of SDTX. Congress has considered bankruptcy venue reform bills, often with bipartisan support, which would limit venue options to principal place of business, but none have been voted into law.

However, many practitioners argue that having magnet courts for major cases is justified. In most jurisdictions, bankruptcy judges primarily handle Chapter 7 and Chapter 13 cases and only occasionally deal with a major Chapter 11 case. Concerned with the ability of these courts to move swiftly and understand the relief requested, debtors' counsel often prefer to take major cases to SDNY or Delaware, where such cases are routine.

SDTX Makes a Play

In 2015, during a time of plummeting oil prices, Judge David Jones, the chief bankruptcy judge in SDTX, and Judge Marvin Isgur decided to build upon their backgrounds working together as sophisticated Chapter 11 attorneys and make their district a welcoming place for the new wave of oil and gas bankruptcy cases, rather than see them wind up in SDNY and Delaware.

One key initial decision was to implement a standing order providing that Judge Jones and Judge Isgur would be the only judges to handle complex Chapter 11 cases in the district. This would help assure debtors that their case would receive a judge with deep knowledge of Chapter 11 issues.

The efforts of attorneys were also key in wooing major Chapter 11 debtors to file in SDTX. Houston bankruptcy attorney Patty Tomasco, a partner at Quinn Emanuel and current chair of SDTX's Complex Case Committee, described how her former firm had served as local counsel for bankruptcy giant Kirkland & Ellis, and how she helped convince them that they should file their cases in SDTX rather than elsewhere. In early 2016, Kirkland brought three cases to the district, and was apparently pleased with how the cases were administered. After that, other debtors' counsel felt more comfortable bringing cases there, and SDTX began receiving a steady stream of major cases. From 2016 through 2019, SDTX had nearly as many major Chapter 11 filings as SDNY.

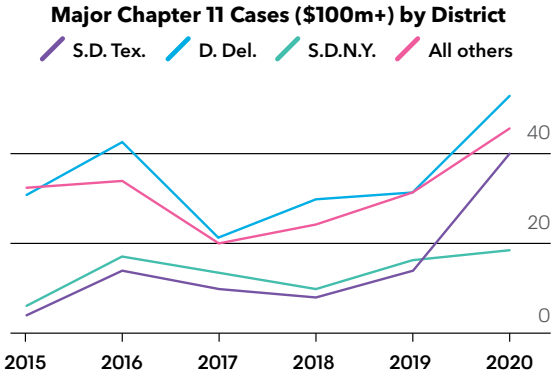
New Complex Case Procedures

In 2018, Tomasco continued her efforts to attract major bankruptcy cases to SDTX. She drafted new Complex Case Procedures and reinvigorated the Complex Case Committee that ultimately refined the procedures and continues to refine the procedures today. Members of the district's Complex Case Committee serve for staggered three-year terms and are made up of a broad swath of interested parties, including someone from the Justice Department, the United States Trustee's office, a Delaware attorney, a balance of Texas and non-Texas attorneys, and a mix of debtor and creditor attorneys.

The Complex Case Procedures are designed to ensure a level of predictability, provide a single point of contact with the court for pre-filing debtors, and ensure the ability to obtain hearings with the court on an expedited basis. Most of all, the Complex Case Procedures seek to maximize, in equal proportion, efficiency and fairness.

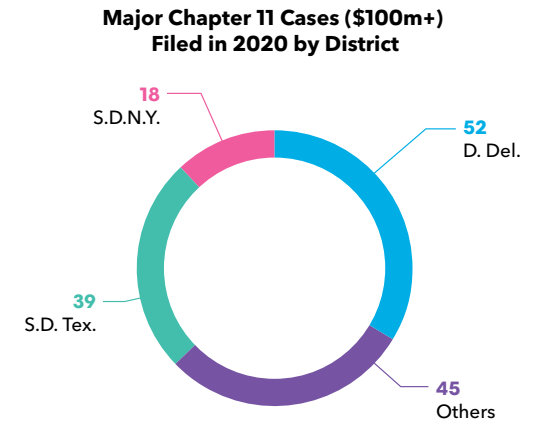
SDTX Filing Boom

An analysis of major bankruptcy case filings in 2015–2020 shows that SDTX immediately began receiving a significant number of case filings once Judge Jones's standing order was in place. As noted above, in 2016–2019, SDTX had nearly as many major case filings as SDNY in each year.



Source: Bloomberg Law Dockets (as of December 1, 2020)

SDTX's major case filings truly took off in 2020. As of Dec. 1, the court already has more than doubled its caseload from last year with 39 cases, nearly twice as many major cases as SDNY. It will likely finish in a strong second place behind Delaware for major case filings.



Source: Bloomberg Law Dockets (as of December 1, 2020)

The oil and gas industry, no stranger to boom and bust cycles, fueled the majority of filings in SDTX from 2016 to 2019 while the rest of the country was in a "bankruptcy recession." But SDTX major cases expanded beyond energy in 2020. This year, department stores, retail chains, restaurant franchisees, restaurant chains, and mall landlords whose financial troubles were deepened by the Covid-19 pandemic, sought Chapter 11 relief in SDTX. These debtors include Neiman Marcus, JC Penney, Tailored Brands (Men's Wearhouse), California Pizza Kitchen, and CBL & Associates (a mall operator). In many of this year's cases, debtor's counsel could have filed their cases in Delaware, because one or more subsidiaries were incorporated there, but chose to file the case in SDTX instead.

While there may be strategic legal considerations behind the selection of forum, it appears that debtors now consider SDTX equal to the task of handling a major Chapter 11 case as Delaware or SDNY. The standing order limiting the cases to Judge Jones and Judge Isgur and the new Complex Case Procedures have enhanced this level of trust.

Kelli Norfleet, a partner in the Houston office of Haynes & Boone, believes this trend in major filings will continue. She noted that SDTX has provided a "level of consistency and predictability," so that debtors believe "it's safe to file here." Norfleet noted that attorneys have been impressed with the court's efficient handling of these cases and how the judges go out of their way to accommodate a debtor's need for emergency relief. For example, she said, Judge Jones held the JCPenney initial hearing on a Saturday.

Will the Texas-Sized Case Volume Last?

While Texas might not be as popular for incorporation as Delaware, it is the legal residence of an enormous number of companies by virtue of its size. SDTX is also home to many company headquarters, especially in the distressed oil and gas industry. Major national retail companies or shopping center landlords seeking Chapter 11 protection will also have some subsidiary with Texas incorporation or a significant connection to the district.

It remains to be seen whether SDTX will continue experiencing the same volume of cases in the future should the well of oil and gas bankruptcies run dry. But so far, the efforts of the SDTX bench and bar to attract major cases have proven fruitful, and Chapter 11 attorneys based in the district have enjoyed being given the chance to shine.

Bloomberg Law subscribers can find related content on our In Focus: Business Closure resource.

ANALYSIS:

Small Change to SBRA Makes a Big Bankruptcy Difference

By Teadra Pugh
Legal Analyst, Bloomberg Law

Nov. 30, 2020

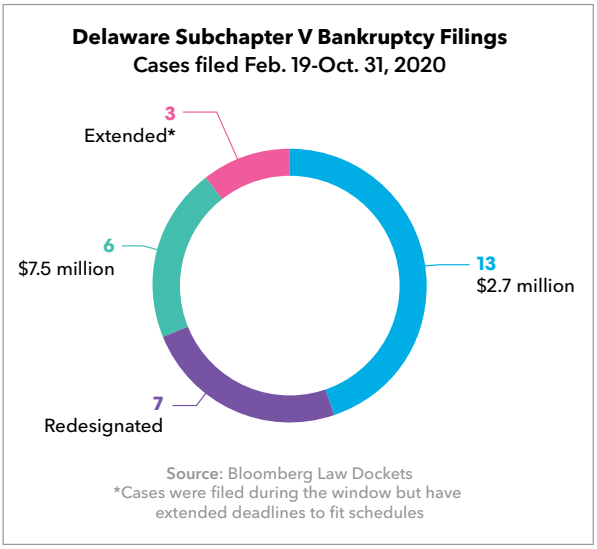
Small business bankruptcies filed under the new Subchapter V accounted for approximately 18% of all Chapter 11 cases filed in 2020 through Oct. 31, according to calculations using Bloomberg Law Dockets and statistics from Epiq. Expanding Subchapter V eligibility could help even more small businesses by allowing them a more direct path to restructuring during this economic downturn.

In the fall of 2019, Congress made several changes to the Bankruptcy Code. One of those changes, the Small Business Reorganization Act (SBRA), created a new subchapter of Chapter 11–Subchapter V–providing a simplified, equity-friendly, and potentially less expensive route to bankruptcy reorganization for small business debtors. While no one could have predicted the nature and level of economic uncertainty encountered in 2020, the 2019 SBRA is proving to be a useful tool for struggling small businesses.

Subchapter V Filings

According to Bloomberg Law Dockets, more than 1,300 debtors have elected to proceed under Subchapter V so far in 2020. This number includes approximately 120 debtors whose cases were filed prior to the Feb. 19, 2020, effective date of the SBRA but chose to amend their petitions to make the election.

Furthermore, when the SBRA became effective, the liability limit to qualify as a small business debtor under the code was $2,725,625. But in March 2020, The Coronavirus Aid, Relief, and Economic Security (CARES) Act temporarily increased the debt limit to $7.5 million for one year.



The case filings in the Bankruptcy Court for the District of Delaware, for example, reveal that of the 29 Subchapter V cases filed there, six (20%) had debtors who became eligible for Subchapter V as a result of the increased liability limit provided by the CARES Act. Another seven (24%) were re-designated when the debtor or an affiliate exceeded the statutory debt limit.

If these patterns are typical of other courts and remain consistent, they could bolster arguments for extending the expiration date of the $7.5 million liability limit beyond March 2021 or even further increasing the debt limit.

Bloomberg Law subscribers can find related content on our In Focus: Business Closure resource.

COMPARISON TABLE:

Temporary Pandemic-Related Bankruptcy Code Provisions

Editor's Note: This chart provides a high-level overview of temporary changes to the Bankruptcy Code made by the Coronavirus Aid, Relief, and Economic Security Act or CARES Act, enacted on March 27, 2020; the Consolidated Appropriations Act, 2021, enacted on December 27, 2020 and the Covid-19 Bankruptcy Relief Extension Act of 2021, enacted on March 27, 2021. See Coronavirus Aid, Relief, and Economic Security Act, Pub L. No. 116-136 , 134 Stat. 281 (2020); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020); and Covid-19 Bankruptcy Relief Extension Act of 2021, Pub. L. No. 117-5, 135 Stat. 249 (2021). Sunset periods are provided in the chart below.

As of March 31, 2021.

Topic/Code Provision	Summary of Amendment	Sunset/Expiration
CURRENT MONTHLY INCOME CALCULATION (Chapter 7; Chapter 13) 11 U.S.C. § 101(10A)(B)(ii)	Covid-19 stimulus payments are excluded from "current monthly income" calculation.	Sunsets 2 years after enactment (March 27, 2022).
FINANCING/ELIGIBILITY FOR PPP LOANS/PLAN TREATMENT 11 U.S.C. § 364(g); 11 U.S.C. § 503(b)(10); 11 U.S.C. § 1191; 11 U.S.C § 1225; 11 U.S.C. § 1325	Subchapter V, Chapter 12 and Chapter 13 debtors now may be able to obtain Paycheck Protection Program ("PPP") loans even while in bankruptcy with court approval. Debt from the loan is given administrative expense priority. Sections 1191, 1225 and 1325, which govern plan confirmation for Subchapter V, Chapter 12, Chapter 13, respectively, are amended to provide some flexibility so that administrative expenses due to PPP loans do not have to be paid in full immediately upon confirmation or before other creditors. Rather, the payments can be made according to the terms of the loan.	These amendments are contingent on the SBA Administrator submitting a written report to the Director of the Executive Office for the United States Trustees that Subchapter V, Chapter 12 and Chapter 13 debtors are eligible to receive PPP Loans. See United States Trustee website for developments concerning availability of PPP loans in bankruptcy. If amendments take effect, they sunset 2 years after enactment (December 27, 2022).
EXECUTORY CONTRACTS 11 U.S.C. § 365(d)	Subchapter V debtors experiencing "material financial hardship" due to the Covid-19 pandemic can seek a 60-day extension from petition date to perform commercial lease obligations and an additional 60-day extension of time is also possible; however, these periods cannot extend beyond assumption or rejection of the lease. The resulting claims qualify as administrative expenses. Deadline to assume or reject unexpired commercial lease is extended from 120 days to 210 days. 11 U.S.C. § 365(d)(4)(i). This extension applies in all cases.	Sunsets 2 years after enactment, (December 27, 2022); this amendment applies to any Subchapter V debtor who files before the 2-year window expires.

Topic/Code Provision	Summary of Amendment	Sunset/Expiration
UTILITIES 11 U.S.C. § 366	Prevents utilities from cutting off service to individual debtors as long as they (A) "make [ ] a payment to the utility for any debt owed to the utility for service provided during the 20-day period beginning" on the petition date and (B) after such 20-day period, "make [ ] a payment to the utility for services provided during the pendency of case when such a payment becomes due."	Sunsets 1 year after date of enactment (December 27, 2021).
CARES FORBEARANCE CLAIMS 11 U.S.C. § 501(f)(1) and 11 U.S.C. § 502(b)(9)	CARES forbearance claims are supplemental claims that grow out of the forbearance provisions in the CARES Act. Creditors holding forbearance claims should file supplemental proofs of claim providing the additional information by the deadlines provided in the amended sections. These claims probably will come up most often with mortgage companies in Chapter 13 cases.	Sunsets 1 year after date of enactment (December 27, 2021).
CUSTOMS DUTIES 11 U.S.C. § 507(d)	11 U.S.C. § 507 governs priority claims. However, section 507(d) provides that entities that are subrogated to the rights of certain holders of priority claims are not subrogated to those claimholders' rights to priority treatment. This new amendment carves holders of claims related to customs duties out of this rule. Accordingly, a subrogee of a claim related to 11 U.S.C § 507(a)(8)(F) is entitled to priority treatment.	Sunsets 1 year after date of enactment (December 27, 2021).
DISCRIMINATION 11 U.S.C. § 525	A person may not be denied CARES Act relief because the person is or has been a debtor in bankruptcy. The relief provisions include the foreclosure moratorium (15 U.S.C. § 9056), forbearance of residential mortgage loan payments for multifamily properties with Federally backed loans (15 U.S.C. § 9057), and the temporary moratorium on eviction filings (15 U.S.C. § 9058).	Sunsets 1 year after date of enactment (December 27, 2021).
PROPERTY OF THE ESTATE 11 U.S.C. § 541(b)	Recovery rebates (stimulus payments) for individuals, made under section 6428 of the Internal Revenue Code of 1986 are excluded from property of the estate.	Sunsets 1 year after date of enactment (December 27, 2021).
PREFERENCES 11 U.S.C. § 547(b)	Certain prepetition "[c]overed payment[s] of rental arrearages" made to commercial landlords and "covered payment[s] of supplier arrearages" will not be avoidable as preferences. The payments have to be made in connection with a forbearance agreement or arrangement with a landlord or vendor, made on or after March 13, 2020. The payments due under forbearance cannot exceed the amount due under the agreement as it existed prior to March 13, 2020. The "covered payments" do not include any increased charges made after March 13, 2020 or fees, penalties and interest in excess of what would normally be due if the debtor was paying on time.	Sunsets 2 years after enactment (December 27, 2022); this amendment applies to any debtor who files within the two-year window.
WHO MAY BE A SUBCHAPTER V DEBTOR? 11 U.S.C. § 1182(1)(A)	Debt limit to qualify as Subchapter V debtor increased from $2,725,625.00 to $7,500,000.00	Sunsets 2 years after enactment (March 27, 2022).

Topic/Code Provision	Summary of Amendment	Sunset/Expiration
DISPOSABLE INCOME CALCULATION Chapter 13 11 U.S.C. § 1325(b)(2)	Covid-19 stimulus payments do not have to be paid into the Chapter 13 Plan.	Sunsets 2 years after enactment (March 27, 2022).
DISCHARGE 11 U.S.C. § 1328	Allows debtors who have not completed payments to the chapter 13 trustee or home mortgage lender to receive discharge if they (A) missed no more than three mortgage payments due to "material financial hardship" caused by the Covid-19 pandemic that are being paid under a plan to cure a default under 11 U.S.C. § 1322(b)(5) or (B) are making cure payments and have entered into a forbearance agreement or loan modification with the holder or servicer of the mortgage.	Sunsets 1 year after date of enactment (December 27, 2021).
MODIFICATION OF CHAPTER 13 PLANS 11 U.S.C. § 1329	Debtors whose cases were confirmed prior to March 27, 2021 and are "experiencing or [that have] experienced a material financial hardship due, directly or indirectly" to the COVID-19 pandemic may be able to extend their plans for up to seven years after the first plan payment was due. Plans also may be modified to account for CARES Forbearance Claims.	Plan period extension modification (§ 1329(d)) – limited to plans confirmed prior to March 27, 2021. Sunsets 2 years after date of enactment (March 27, 2022). Plan modification for CARES forbearance claims (§ 1329(e)) - Sunsets 1 year after date of enactment (December 27, 2021).

Disclaimer: This document and any discussions set forth herein are for informational purposes only, and should not be construed as legal advice, which has to be addressed to particular facts and circumstances involved in any given situation. Review or use of the document and any discussions does not create an attorney-client relationship with the author or publisher. To the extent that this document may contain suggested provisions, they will require modification to suit a particular transaction, jurisdiction or situation. Please consult with an attorney with the appropriate level of experience if you have any questions. Any tax information contained in the document or discussions is not intended to be used, and cannot be used, for purposes of avoiding penalties imposed under the United States Internal Revenue Code. Any opinions expressed are those of the author. The Bureau of National Affairs, Inc. and its affiliated entities do not take responsibility for the content in this document or discussions and do not make any representation or warranty as to their completeness or accuracy.

PRACTICAL GUIDANCE:

Proofs of Claim – Overview

Editor's Note: Review the Temporary Pandemic-Related Bankruptcy Code Provisions chart for a summary of amendments to 11 U.S.C. § 501 and other sections of the bankruptcy code.

A Proof of Claim is usually the most critical step in a creditor receiving payment out of a bankruptcy case. 11 U.S.C. § 501(a). Pursuant to Fed. R. Bankr. P. 3002(a), most creditors, secured and unsecured, must file a proof of claim documenting the nature and amount of the claim as of the petition date. Creditors of Chapter 11 debtors do not need to file a proof of claim if their claim is properly filed in the case and is not contingent, disputed, or unliquidated. Fed. R. Bankr. P. 3003.

The Administrative Office of the United States Courts provides an official Proof of Claim form as well as attachments and supplemental proof of claim forms for mortgagors to use with regard to certain consumer mortgages. Redacted supporting documents sufficient to evaluate the claims, such as copies of promissory notes, mortgages, certificates of title, leases and invoices, should be filed with the official forms. Fed. R. Bankr. P. 3001(c)-(d). Proofs of claim and supporting documentation should be filed according to the instructions in the notice setting forth the claims bar date. In most cases, proofs of claim should be filed electronically using the applicable court's online claims filing system.

Deadline

In most cases, failure to timely file a proof of claim will exclude a creditor from participating in distributions unless otherwise allowed by the court.

The deadline to file a proof of claim varies depending on the type of case. The claims bar date for most cases will be noted in the Notice of Bankruptcy Case filing sent to creditors at the start of the bankruptcy case. In Chapter 11 cases, however, creditors will receive a separate notice during the course of the case informing creditors of the deadline. Similarly, in Chapter 7 cases in which there are no assets for the trustee to liquidate (no-asset case), creditors are instructed not to file proofs of claim until instructed to do so by the trustee. In the event the trustee locates assets, creditors will receive a Notice of Possible Dividends noting the claims bar date.

If the creditor has misplaced the notice, the claims bar date can also be found on the docket or the creditor may refer to the deadline calculations provided in Fed. R. Bankr. P. 3002(c). In the event the creditor does not receive notice of the claims bar date, it could seek to extend the deadline pursuant to Fed. R. Bankr. P. 3002(c)(6). When the creditor fails to timely file a proof of claim, the debtor or trustee may file one pursuant to Fed. R. Bankr. P. 3004; 11 U.S.C. § 501(c).

Amendments, Withdrawals, and Objections to Proofs of Claim

A creditor may amend its proof of claim by filing a revised proof of claim and selecting the box indicating that the form amends a previously filed claim. Courts generally allow creditors to amend proofs of claim as needed, without motion or notice. Proofs of claim filed after plan confirmation or the filing deadline, however, will meet more scrutiny. Creditors holding claims secured by liens on an individual debtor's principal residence are required to supplement their proofs of claim prior to adjusting the mortgage payment. Fed. R. Bankr. P. 3002.1(b).

Furthermore, Fed. R. Bank. P. 3006 allows a creditor to freely withdraw its claim prior to (i) the creditor voting on a proposed plan, (ii) filing of an adversary proceeding against the creditor, or (iii) a party has filed an objection to the claim by filing a Notice of Withdrawal with the court. If any of the aforementioned has occurred, however, the creditor could file a motion for court approval to withdraw the claim.

A party in interest may file an individual or omnibus objection to a claim pursuant to Fed. R. Bankr. P. 3007 and the creditor may move for reconsideration of an order disallowing the claim pursuant to Fed. R. Bankr. P. 3008.

Consequences of Filing a Proof of Claim

In addition to ensuring the claim is properly reflected in the bankruptcy case and that the creditor's place in line to receive its pro rata share of any disbursements, filing a proof of claim is effectively consenting to the bankruptcy court's jurisdiction over the actual claim and other related matters. BCite Analysis. Courts have treated proofs of claim filed by the creditor or creditor's representative as consent to jurisdiction in the cases of both domestic and foreign creditors and even where creditors have explicitly stated on the proof of claim that filing the claim does not constitute consent to the court's jurisdiction.

Furthermore, filing the proof of claim effectively waives the creditor's right to a jury trial on certain matters related to the claim, including preference and fraudulent transfer actions. BCite Analysis; *See also* Bloomberg Law: Bankruptcy Treatise: Chapter 50: Bankruptcy Code § 501 - Filing of Proofs of Claims or Interests.

PRACTICAL GUIDANCE:

Timeline – Voluntary Chapter 11 Process

Editor's Note: This Voluntary Chapter 11 Process Timeline gives a bird's eye view of the Chapter 11 bankruptcy process for non-small business debtors. Users can access more detailed information about many of the topics in the Chapter 11 practical guidance collection.

As of December 27, 2020.

Case Phase	Deadlines & Time Periods	Case Activity
Pre-Petition	Weeks to Months pre-petition depending on the size of the case.	• Collect & Analyze Creditor Data • Negotiate with Creditors • Negotiate DIP Financing Terms • Plan case strategy • Prepare Petition, Schedules, First Day Motions, and Related Filings • Pre-Negotiated Cases – Debtor discusses general bankruptcy plans and strategies with key creditors. • Pre-Packaged Cases – Debtor works with creditors to craft the plan and solicit plan acceptances • Some courts require notice prior to filing a Chapter 11
Petition Date	Day 1	• File Petition, Schedules and other required documents • Petition triggers Automatic Stay • Court sends notice of case filing to all creditors • File, serve, and set hearings for First Day Motions
Pre-Confirmation	Days 1-120 Post-Petition – Exclusivity Period (can be extended to 18 months) Days 1-180 Post-Petition – Plan Acceptance Period (can be extended to 20 months)	• Debtor-in-Possession continues to operate and stabilize • Schedules not filed on Day 1 are due within 14 days of Petition Date • Reassess Chapter 11 strategy • Negotiate plan terms with creditors • Debtor files Monthly Operating Reports by 21st of following month • Quarterly Fees due 1 month after the end of each calendar quarter • Debtor files Plan and Disclosure Statement or requests extension • If Disclosure Statement approved, debtor serves Ballots and creditors vote • Creditors' Committee may be appointed • Debtor may file motions to sell assets or assume or reject lease/unexpired executory contract • Debtor may initiate avoidance actions or file claim objections
Confirmation		• Ballots tabulated and results reported • Court holds Confirmation Hearing • Court enters Confirmation Order • Debtor receives Discharge upon confirmation • Action to deny Discharge initiated no later than 1st Confirmation Hearing date • Pre-Packaged Cases: Many pre-packaged Chapter 11 plans are confirmed within the first months of the case
Post-Confirmation	Days 1-180 Post-Confirmation – Revocation Deadline	• Plan implementation begins on the plan's Effective Date • Avoidance actions, claim objections and asset sales may continue • Disbursements to Creditors • Debtor files final report • Debtor may move to modify plan prior to substantial consummation

Bloomberg Law

To learn more about Bloomberg Law, contact your representative at 888.560.2529 or visit pro.bloomberglaw.com

Bloomberg Law is a trademark and service mark of Bloomberg Finance L.P. (a Delaware limited partnership), or its subsidiaries. 0121 115624

Faculty

Aaron Cutler is a partner with Hogan Lovells in Washington, D.C., in its Government Relations and Public Affairs practice. He lobbies Congress in the energy and natural resources, banking and financial services, and technology, media and telecom sectors, and provides strategic advice to CEOs and executive managers on transactions and risks related to those transactions. He also monitors companies and investment funds. Mr. Cutler previously was a senior House staffer, serving as senior advisor for Policy and Outreach for House Majority Leader Eric Cantor (R-Va.). In this role, he was the leader's direct liaison to the House Committees on Financial Services, Natural Resources and Energy and Commerce, and helped shepherd more than 100 bills on the floor. He coordinated legislative strategy with chairmen, members and their staff, and other leadership and committee offices, and led outreach efforts to the business and finance community. Mr. Cutler began his Hill career as a lawyer on the Energy and Commerce Committee staff under Rep. Joe Barton (R-Texas), where he focused on energy and environment policy. He then advanced to deputy policy director and counsel under Chairman Fred Upton (R-Mich.) with a broad policy portfolio. He also served as a senior policy advisor and counsel on the House Committee on Natural Resources under Chairman Doc Hastings (R-Wash.). During his time on Capitol Hill, Mr. Cutler was named by the National Journal as one of the top five staffers on energy and environmental issues. He is a frequent speaker at industry conferences, and was named a "top lawyer under 40" by *Bisnow*. Prior to his political career, he was an associate at two international law firms in New York, where he worked on futures and derivatives law, formed new private investment funds, and structured complex financial instruments. Mr. Cutler has been listed annually since 2015 in the *Legal 500 US* for Government Relations, and in 2015 was listed in *The DCA* as one of Washington's Trending 40, Lawyers Under 40. Mr. Cutler received his B.A. in 2002 from The George Washington University and his J.D. in 2004 from the University of Michigan Law School.

Karol K. Denniston is a partner in the San Francisco office of Squire Patton Boggs and a member of its Global Board, as well as the firm's Advancing Women Task Force. She negotiates restructurings and has been a mediator since 1992. Ms. Denniston has been working in the distress municipal sector since 2009 and routinely represents cities, special districts, indenture trustees, bondholders, taxpayers and monoline insurers in a variety of municipal restructuring engagements throughout the U.S. She has represented clients in municipal insolvency proceedings with a focus on negotiating resolutions, including in Puerto Rico PROMESA restructurings for the Government Development Bank and COFINA. *The Legal 500* has designated Ms. Denniston as a municipal restructuring Leading Lawyer. She is admitted to practice in Texas and California. Ms. Denniston received her B.A. in 1980 from Concord College, and her M.A. in 1982 and J.D. in 1985 from West Virginia University.

Jim Moran is a senior policy adviser with Nelson Mullins Riley & Scarborough LLP in Washington, D.C., and a former congressman who served as mayor of Alexandria, Va., from 1985-90, and as the U.S. Representative for Virginia's 8th congressional district from 1991-2015. He began his career in the Comptroller's Office of the U.S. Dept. of Health, Education and Welfare, then went on to become senior specialist in Budgetary and Fiscal Policy for the Library of Congress. From there, he became a professional staff member of the Senate Appropriations Committee. Mr. Moran left the Senate staff in 1980 to pursue a political career. After serving as mayor of Alexandria, Va., he was elected to the U.S.

Congress in 1990. During his congressional career, he was a member of the Budget, Finance, Foreign Affairs and Appropriations Committees. In his 22 years on Appropriations, he was a member of the Defense, Interior, Health & Human Services, Veteran's Affairs and Military, Foreign Operations and Legislative Branch Subcommittees. He also was a member of the Steering and Policy Committee and founded the New Democratic Coalition, currently the largest caucus in the Congress, which represents moderate, pro-business Democratic members. Mr. Moran received his B.A. in economics in 1967 from the College of the Holy Cross and his Master of Public Administration in 1970 from the University of Pittsburgh.

Teadra Pugh is an analysis manager of bankruptcy at Bloomberg Law in Charlotte, N.C. She previously was an analyst at Seal Software, special counsel at Parker Poe Adams & Bernstein LLP, and a clerk for Chief Judge Laura T. Beyer of the U.S. Bankruptcy Court for the Western District of North Carolina. Ms. Pugh received her B.A. in history in 2003 from Spelman College and her J.D. in 2006 from Vanderbilt University Law School.

Bill Shuster is a senior policy advisor with Squire Patton Boggs in its Washington, D.C., office, where he provides strategic advice and consulting to clients on a wide range of public policy matters, including transportation, infrastructure and local governments. During his tenure in the U.S. House of Representatives, he was devoted to fostering, promoting and expanding economic opportunities across the country. A former chairman of the House Transportation and Infrastructure Committee, he earned a reputation for effectively working across the aisle to improve America's infrastructure. Congressman Shuster represented the people of Pennsylvania's 9th Congressional District in Congress for more than 17 years, first elected in 2001, and served on the House Transportation and Infrastructure Committee, becoming chairman of that committee in 2013 after previously serving as chairman of the Subcommittee on Economic Development, Public Buildings and Emergency Management, and then as chairman of the Subcommittee on Railroads, Pipelines, and Hazardous Materials. In this role, he spearheaded legislation aimed at strengthening U.S. infrastructure, including the Fixing America's Surface Transportation Act, the Passenger Rail Reform and Investment Act, the Protecting our Infrastructure of Pipelines and Enhancing Safety Act, the Federal Aviation Administration (FAA) Reauthorization Act of 2018 and multiple Water Resources Developments Act and authorizations of the U.S. Coast Guard. Prior to becoming chairman, Congressman Shuster's accomplishments included the successful passage of the Pipeline Safety, Regulatory Certainty, and Job Creation Act and the Passenger Rail Investment and Improvement Act. He served on the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, and he was a member of the House Committee on Armed Services and its Subcommittee on Emerging Threats and Capabilities. Before serving in Congress, Congressman Shuster developed experience in the private sector, working in marketing and management for the Goodyear Tire and Rubber Corp. and for Bandag Inc. as district manager. He then became the successful small business owner and operator of an automobile dealership in East Freedom, Pa. He is the son of former Congressman Bud Shuster. Congressman Shuster received his B.A. in 1983 from Dickinson College and his M.B.A. in 1987 from American University.