The Future of Retail

I. Relevant Amendments to the Bankruptcy Code

A. *The Small Business Reorganization Act (SBRA)*

The *Small Business Reorganization Act* (SBRA) was signed into law on August 23, 2019 and became effective on February 19, 2020. By enacting a new Subchapter V to Chapter 11 of the Bankruptcy Code, the SBRA allowed small businesses to access the benefits of Chapter 11, e.g., continue the business, preserve jobs and maximize value and creditor recoveries, through a more condensed, streamlined and cost-effective process. Originally, Subchapter V was only available to small businesses with non-contingent, liquidated debts of not more than $2,725,625. Among the many differences from a traditional Chapter 11 case, a Subchapter V case:

- Has a trustee, who monitors the debtor's progress towards plan confirmation and performs many of the duties of a Chapter 12 or Chapter 13 standing trustee;
- Does not require appointment of an official committee of unsecured creditors;
- Eliminates the absolute priority rule, which would otherwise require that a dissenting class of unsecured creditors must be paid in full before any junior class can receive or retain property under the plan; and
- Allows a debtor to confirm a plan without the approval of any class of creditors, as long as the plan does not discriminate unfairly and is fair and equitable with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

Shortly after the SBRA went into effect, the World Health Organization declared COVID-19 a pandemic and the U.S. declared it a national emergency. By the end of March 2020, 29 states and territories had issued stay at home orders.[1]

[1] Amanda Moreland, Christine Herlihy, Michael A. Tynan, et al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement — United States, March 1–May 31, 2020*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Sept. 4, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6935a2.htm (last visited June 23, 2021).

B. *The Coronavirus Aid, Relief and Economic Security Act (CARES Act)*

On March 27, 2020, the *Coronavirus Aid, Relief and Economic Security Act* (CARES Act), the largest economic recovery package in history, was signed into law. The CARES Act contained a number of bankruptcy-related provisions. Importantly, the CARES Act amended the SBRA to increase, temporarily, the debt limit for Subchapter V small business debtors from $2,725,625 to $7,500,000 (inclusive of secured and unsecured debt, but excluding debt owed to affiliates or insiders).

On March 27, 2021, the date that this and other bankruptcy-related CARES Act provisions were scheduled to expire, Congress extended them through March 27, 2022 by passing the *COVID-19 Bankruptcy Relief Extension Act of 2021*. Absent further extension, the Subchapter V debt limit will revert to $2,725,625 after that date.

The CARES Act also established the Paycheck Protection Program (PPP), a loan program for small businesses backed by the U.S. Small Business Administration (SBA) under which up to the entire amount of the principal loan may be forgiven. Although nothing in the text of the CARES Act prohibited debtors in bankruptcy from applying for or receiving PPP funds, the SBA has opposed PPP loans for debtors "presently involved in any bankruptcy." On April 6, 2021, the SBA issued guidance clarifying that a Chapter 11 debtor is considered to be "presently involved in any bankruptcy" for PPP eligibility purposes, and therefore not able to apply for a PPP loan, until the Bankruptcy Court enters an order confirming the plan or dismissing the case.[2] The PPP ended on May 31, 2021, but existing borrowers may be eligible for PPP loan forgiveness.

C. *The Consolidated Appropriations Act of 2021 (CAA)*

On December 21, 2020, Congress passed the Consolidated Appropriations Act of 2021 (CAA), which was signed into law on December 27, 2020. The CAA contained several amendments to the Bankruptcy Code pertinent to retail. These amendments will sunset on December 27, 2022.

First, the CAA modified Section 365(d)(3) of the Bankruptcy Code to provide small business debtors experiencing, or having previously experienced, a material financial hardship due to the COVID-19 pandemic with an additional 60 days (up to 120 days total) to perform all post-petition obligations arising under the terms of an unexpired non-residential real property lease. Importantly, this rent deferral provision only applies to debtors in Subchapter V cases.

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[2] *Paycheck Protection Program Loans Frequently Asked Questions (FAQs)*, U.S. SMALL BUSINESS ADMINISTRATION (Apr. 6, 2021), https://www.sba.gov/sites/default/files/2021-04/PPP%20FAQs%204.6.21%20FINAL-508.pdf (last visited June 23, 2021).

In addition, Section 365(d)(4) of the Bankruptcy Code now allows all debtors an additional 90 days (up to 300 days total) to assume or reject unexpired non-residential real property leases for cause and without written consent of the landlord. However, if the debtor does not perform its obligations under the lease during this extended period, the landlord may seek an order compelling the debtor to perform or seek relief from the automatic stay to pursue state law remedies.

Lastly, in consideration of the concessions that vendors and landlords have made during the pandemic to help their customers and tenants, the CAA also amended Bankruptcy Code Section 547 to protect certain payments to vendors and landlords that might otherwise have been subject to recovery as preferential transfers if the customer or tenant subsequently filed for bankruptcy protection. Payments made by a debtor within 90 days before filing for bankruptcy that are outside the ordinary course of business can be considered preferential and might be subject to claw-back by a debtor on that basis. For example, a payment of deferred rent pursuant to a negotiated arrangement with a landlord might be considered outside of the ordinary course because it is irregular and not in accordance with the terms of the lease. To encourage rent deferral and vendor repayment agreements, the new Section 547(j)(2) provides that a debtor may not avoid a "covered payment of rental arrearages" or a "covered payment of supplier arrearages." A "covered payment of rental arrearages" means a payment of arrearages made in connection with an agreement or arrangement entered into on and after March 13, 2020 between a debtor and a landlord to delay or postpone payment of rent and other periodic charges under a non-residential real property lease. The payment of arrearages cannot exceed the amount of rent and periodic charges due under the lease before March 13, 2020. It also cannot include fees, penalties or interest in an amount greater than (i) what is scheduled to be paid under the lease or (ii) what the debtor would owe if it had made all payments on time and in full before March 13, 2020. The exception for a "covered payment of supplier arrearages," which applies to amounts due under an executory contract for goods or services, is substantially similar.

II. Deferral of Lease Obligations under Section 365(d)(3)—The New Normal, or a True Emergency?

A. Relevant Code Sections

In seeking relief from payment of post-petition rent and other lease obligations, debtors generally rely on three sections of the Bankruptcy Code—Sections 105(a), 305, and 365(d)(3).

Section 105(a) of the Bankruptcy Code provides bankruptcy courts with broad equitable authority and is often cited by counsel when statutory authority for a proposed action is not clear under other sections of the Bankruptcy Code. Section 105(a) states that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

Section 305 of the Bankruptcy Code addresses abstention by the Bankruptcy Courts. Section 305(a)(1) authorizes the Court to dismiss a case or suspend all proceedings in a case, at any time, if "the interests of creditors and the debtor ***would be better served*** by such dismissal or suspension." 11 U.S.C. §305(a)(1) (emphasis added).

Section 365(d)(3) of the Bankruptcy Code requires debtors to stay current on their non-residential real property lease obligations post-petition. However, upon a showing of "cause," the Bankruptcy Court may defer a debtor's rent obligations for 60 days after the petition date. Section 365(d)(3) states in relevant part:

> The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. ***The court may extend, for cause, the time for performance of any such 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.***

11 U.S.C. § 365(d)(3) (emphasis added).

As noted above, section 365(d)(3) was amended in the CAA to allow Subchapter V debtors only with an additional 60 days (up to 120 days total) to perform all post-petition obligations arising under the terms of an unexpired non-residential real property lease.

B. *Circuit City: The Genesis of Rent Deferral*

The concept of rent deferral, albeit in a much more limited form, has its beginnings in the *Circuit City* bankruptcy case, where the Bankruptcy Court held that the payment of "stub rent" (*i.e.*, the rent accruing from the petition date to the last day of the first calendar month of the bankruptcy case) is an administrative expense claim, rather than a "superpriority claim." *In re Circuit City Stores, Inc.*, 447 B.R. 475, 510 (Bankr. E.D. Va. 2009). As such, debtors do not have to pay claims for stub rent immediately but can instead pay such claims upon plan confirmation, with all other administrative expense claims. *Id.* at 511.

When it was issued, the *Circuit City* opinion garnered significant attention and generated much legal debate. Over time, the basic holding of Circuit City—that stub rent was not immediately due and payable—became a cornerstone in the strategic plan for retail debtors. The goal is to make the stub rent period as long as possible (and thus make the stub rent claim as large as possible) by filing the bankruptcy petition as soon as all monthly rent obligations are due and payable.

C. *Rent Deferral in the COVID-19 Era*

As noted previously, the traditional brick and mortar retail sector was particularly hard hit by COVID. Stay-at-home orders led to the closure of "non-essential" retail locations for 90 days in most states. Stores were eventually permitted to reopen, but only with strict capacity limits and social distancing orders in place. Many consumers opted not to return to physical store locations immediately, instead continuing to rely on online stores, Instacart, and other home shopping avenues.

1. Pier 1

Pier 1 Imports, Inc., and seven of its affiliates each filed a voluntary chapter 11 bankruptcy petition on February 17, 2020, about one month prior to the imposition of widespread COVID-19 pandemic restrictions (*In re Pier 1 Imports, Inc., et al.*, United States Bankruptcy Court for the Eastern District of Virginia, Case No. 20-30805). Pier 1 entered bankruptcy with the support of the majority of its term-loan lenders pursuant to a Plan Support Agreement. Pier 1 also had a commitment of approximately $256 million in debtor-in-possession financing from Bank of America N.A., Wells Fargo National Association, and Pathlight Capital LP. The bankruptcy was filed to facilitate an orderly liquidation of Pier 1's assets and to implement the PSA. Pier 1 anticipated closing up to 450 of its retail locations, but pledged that all other locations would stay open for business.

To that end, as part of its first day motions, Pier 1 filed a motion to establish bid procedures, set bid deadlines, approve the form of asset purchase agreement, and related relief (the "**Bid Procedures Motion**") [Docket No. 34]. The Bid Procedures Motion was approved by order entered on February 18, 2020 (the "**Bid Procedures Order**") [Docket No. 102]. The Bid Procedures Order set deadlines of March 23, 2020, for the submission of bids and March 31, 2020 as the auction. On March 27, 2020, Pier 1 filed a Notice of Cancellation of Auction [Docket No. 428].

On March 31, 2020, the day the auction was supposed to be held, Pier 1 filed an emergency motion to approve relief related to the interim budget, temporarily adjourn certain motions and applications for payment, and related relief (the "**Adjournment Motion**") [Docket No. 438]. Pursuant to the Adjournment Motion, Pier 1 sought authorization to preserve its liquidity by, among other things, deferring rent payments and adjourning any motions to compel payment or for relief from the automatic stay for at least 45 days after the end of the "Limited Operation Period." Pier 1 argued that granting the relief sought in the Adjournment Motion was well within the Bankruptcy Court's equitable powers under section 105 of the Bankruptcy Code and was comparable to relief granted by other bankruptcy courts under section 105 (*e.g.*, staying or prohibiting actions by third parties that would affect the administration of the estate; tolling certain time periods under the Bankruptcy Code; etc.).

Numerous landlords filed objections to the Adjournment Motion. Nonetheless, on April 6, 2020, the Bankruptcy Court entered an order granting the Adjournment Motion (the "**Adjournment Order**") [Docket No. 493], published at 2020 Bankr. LEXIS 1242 (Bankr. E.D. Va. May 10, 2020). The relief granted in the Adjournment Order was extended by supplemental order [Docket No. 629] through and including May 31, 2020.

In granting the relief, the Court discussed the unprecedented nature of the pandemic, noting the pandemic "presents a temporary, unforeseen, and unforeseeable glitch in the administration of the Debtors' Bankruptcy Cases." *Id.* 493 at *18. Recognizing the "extraordinary nature of the relief," the Court relied principally on the broad equitable powers granted by Section 105(a). *Id.* at *14, FN 7. The Court acknowledged that the relief may seem to be inconsistent with Section 365(d)(3), but noted that Section 365(d)(3) does not provide a separate remedy if a debtor cannot comply with its rent obligations. *Id.* at *14-16. If the debtor cannot pay rent timely in violation of Section 365(d)(3), the landlord is not immediately allowed a superiority claim such that it is entitled to immediate payment of its rent obligations. *Id.* Instead, the landlord has a priority administrative expense claim under Sections 507(a)(2) and 503(b). *Id.*

2. Modell's

Modell's Sporting Goods, Inc., was one of the first retail debtors to request that not only its rent obligations be deferred but that its bankruptcy case be "put on ice" pursuant to section 305(a) of the Bankruptcy Code due to the COVID-19 pandemic.

Modell's and thirteen of its affiliates each filed a voluntary chapter 11 bankruptcy petition on March 11, 2020 in the United States Bankruptcy Court for the District of New Jersey (*In re Modell's Sporting Goods, Inc., et al.*, Case No. 20-14179). Among its first day motions, Modell's requested and received, on an interim basis, authorization to conduct going out of business (GOB) sales. On March 21, 2020, New Jersey Governor Phil Murphy signed Executive Order No. 107, directing (a) all New Jersey residents to stay at home until further notice, except for certain exceptions, such as obtaining essential goods and services and (b) the closure of all non-essential retail businesses to the public. Similar executive orders were being enacted by governors across the United States.

On March 23, 2020, Modell's filed an emergency motion for entry of an order temporarily suspending its bankruptcy case (the "**Bankruptcy Suspension Motion**") [Docket No. 115]. Through the Bankruptcy Suspension Motion, Modell's sought to (a) suspend all deadlines and activities in the bankruptcy cases for a period of up to 60 days, (b) defer payment of all expenses other than "essential" expenses, in accordance with a budget attached to the motion, and (c) institute an "Operational Suspension," which included, among other things, (i) cessation of all operations and fulfillment of orders at retail stores and on their e-commerce site, (ii) termination of all store-level and distribution employees, and (iii) termination of all but a "skeleton crew" of thirteen corporate employees "to effectuate critical human relations, finance, and infrastructure technology functions during the Operational Suspension." Modell's argued, pursuant to section 305(a) of the Bankruptcy Code, that this "breathing spell" was in the best interests of creditors, as it would allow Modell's to maximize the value of its inventory and leasehold interests for the benefit of creditors once the COVID-19 pandemic had abated.

Landlords filed numerous objections to the Bankruptcy Suspension Motion, arguing that they were being forced to bear the burden of the bankruptcy case for no compensation, while Modell's lenders continued to accrue interest.[3] Nonetheless, on March 27, 2020, the Bankruptcy Court entered an order granting the relief sought in the Bankruptcy Suspension Motion on a temporary basis through April 30, 2020 (the "**Bankruptcy Suspension Order**") [Docket No. 166], over numerous objections filed by landlords. The Bankruptcy Suspension Order was extended by further orders of the Bankruptcy Court, to May 31, 2020 and June 15, 2020 [Docket Nos. 294 and 371, respectively].

3. Chuck E. Cheese

To the sadness of many, Chuck E. Cheese and his robotic animal band also fell victim to the pandemic. CEC Entertainment, Inc. ("**CEC**"), operates a nationwide chain of Chuck E. Cheese restaurant concepts. CEC filed for Chapter 11 bankruptcy protection in the Southern District of Texas on June 24, 2020. *In re CEC Entertainment, Inc.*, 2020 Bankr. LEXIS 3493 * 9 (Bankr. S.D. Tex. Dec. 14, 2020). After the 60-day deferral period "for cause shown" under Section 365(d)(3) had expired, CEC filed a motion to abate rent payments for 141 locations impacted by COVID-19-related governmental orders or regulations across 12 states. *Id.* The Court denied CEC's motion on December 14, 2020. *Id.* at *1.

CEC argued that its motion to abate should be granted based on three grounds. First, sections 365(d)(3) and 105(a) of the Bankruptcy Code give the Court equitable power to alter CEC's rent obligations. Second, under the circumstances of a global pandemic and government orders eliminating or reducing its operations, the force majeure clauses in the relevant leases allow CEC to delay performance of its obligations. Third, CEC argued that it was relieved from its lease obligations by the doctrine of frustration of purpose. *Id.* at *11.

[3] The budget attached to the Bankruptcy Suspension Motion did not include the payment of rent or debt obligations; however, the budget noted the continued accrual of interest to its lenders.

With the exception of six landlords of locations in North Carolina, Washington, and California, CEC was able to consensually resolve its landlords' objections. *Id.* at *10-11.

The Court held that Section 365(d)(3) unambiguously requires timely performance of all obligations from and after the petition date. *Id.* at *13. Faced with such unambiguous statutory language and intent, the Court found no basis to override this mandate. *Id.* In rejecting CEC's argument that the Court should invoke the broad equitable powers arising under section 105(a), the Court noted that its powers under section 105(a) are not unlimited. *Id.* at *14. The Court reasoned that authorizing such delayed payment of lease obligations is beyond the scope of the Court's authority, and the Court could not override the statutory mandate found in section 365(d)(3). *Id.* at *15. Further, the Court found that neither the force majeure clauses in the leases nor the doctrine of frustration of purpose excused CEC from timely performance of its lease obligations. *Id. at* *47. In so deciding, the Court noted that it disagreed with the holding in *Pier 1*, but perhaps only "on the margins." *Id.* at *14-15.

4. Other Rent Deferral Decisions

Following the initial decisions in Pier 1 and Modell's, many bankruptcy courts around the country were faced with rent deferral requests. A list of the most notable cases follows.

- *In re Chinos Holdings, Inc.*, Case No. 20-32181 (Bankr. E.D. Va., May 4, 2020)—Chinos Holdings, Inc. (J.Crew) filed for bankruptcy on May 4, 2020. The Debtors requested rent deferral with its first day filings [Docket No. 23], but the hearing was continued to May 21, 2020 and then again to May 26, 2020. On May 26, 2020, the Court entered an order granting the relief [Docket No. 323]. The Court cited *Pier 1* as its authority and permitted the Debtors through July 6, 2020 to pay rent. This was an extension through the 63rd day of the case.

- *In re Stage Stores, Inc.*, Case No. 20-32654 (Bankr. S.D. Tex., May 11, 2020)—Stage Stores, Inc. filed for bankruptcy on May 10, 2020. On May 11, 2020, the Debtors filed an emergency motion to defer payment of certain lease obligations [Docket No. 22], which was not heard until May 27, 2020. The Court granted the motion, holding that, for stores closed as of the petition date, rent could be deferred until the earlier of the date on which the store reopens or for a period of 60 days from the petition date [Docket No. 337].

- *In re Ascena Retail Group, Inc.*, Case No. 20-33113 (Bankr. E.D. Va., September 10, 2020)—Ascena Retail Group, Inc. (Ann Taylor) filed for bankruptcy on July 23, 2020. On July 31, 2020, the Debtors filed their rent deferral motion [Docket No. 158] and initially sought a hearing on August 20, 2020. The hearing was continued to August 26, 2020, and again to September 3, 2020. The Court never held a hearing on the matter, because the Debtors and the Committee reached a global resolution, which included, among other things, an agreement to defer rent through and including September 18, 2020 [Docket No. 587, Annex G].

- *In re 24 Hour Fitness Worldwide, Inc.*, Case No. 20-11558 (Bankr. D. Del. June 16, 2020)—24 Hour Fitness Worldwide, Inc. filed for bankruptcy on June 15, 2020. The Debtors filed their rent deferral motion on June 16, 2020 [Docket No. 132]. The hearing was set for June 29, 2020. The motion was granted [Docket No. 407], and the rent deferral relief was later extended by Court order. When the original order was extended, parties were allowed to opt in or opt out of a partial payment protocol, which applied the following criteria: (1) if the location is open, rent is paid; (2) if a government order is keeping the location closed, partial payment is paid; and (3) if the debtor is choosing to close the location, rent is paid. The intention of the partial payments was to reduce financial pressure on the landlords.

- *In re J.C. Penney, Inc.*, Case No. 20-20182 (Bankr. S.D. Tex. May 28, 2020)—J.C. Penney filed for bankruptcy on May 15, 2020. On May 28, 2020, the debtors filed their rent deferral motion [Docket No. 338]. On June 11, 2020, the Court granted the debtors' request to defer rent through and including July 13, 2020, which is sixty days after the petition date pursuant to the limitations of section 365(d)(3).

D. Timing Is Everything

As was the norm after the *Circuit City* decision on stub rent, retail debtors began looking at not just the timing of the filing of the bankruptcy petition but also the timing of the filing of and initial hearings on the rent deferral motion as strategic decisions. The decision as to when to file the rent deferral motion became tied to rent deadlines, so that rent payments (beyond the initial stub rent) could be delayed if the debtors filed mid-month. Delay, continuation, or avoidance of hearings altogether were other strategies used by debtors to delay payment and obtain *de facto* the relief that they sought.

Below is a table showing the timing of the filing of rent deferral motions by certain debtors:

Debtor	*Filing Date*	*Motion Date*	*Days Elapsed*
Pier 1	February 17, 2020	March 31, 2021	42
Modell's	March 11, 2020	March 23, 2020	12
Chinos	May 4, 2020	May 4, 2020	0
Stage Stores	May 10, 2020	May 11, 2020	1
J.C. Penney	May 15, 2020	May 28, 2020	13
24 Hour Fitness	June 15, 2020	June 16, 2020	1
Chuck E. Cheese	June 25, 2020	June 28, 2020	3
Ascena	July 23, 2020	July 31, 2020	8

E. The Future of Rent Deferral

As vaccination rates increase and COVID-19 restrictions are lifted, it remains to be seen whether rent deferral requests will become a remnant of the COVID-19 era or a tool that will continue to be used for strategic advantage. For retail debtors, rent deferral is a powerful tool to conserve cash and apply pressure to landlords for rent or other lease concessions. For landlords, rent deferral is a bitter pill that erodes the concept of adequate protection and undermines the quick resolution of certain leasing issues.

III. Innovations in Brick and Mortar Retail

Prior to the COVID-19 pandemic and during the pandemic brick and mortar locations were evolving, innovating and developing new approaches and accelerating trends that were already gaining traction. The pandemic has powered and sped up innovation and the new face of retail.

A. Instacart

- **Background:**
  - A grocery delivery and pick-up service.
  - Founded in 2012 by a former Amazon employee.
  - Originally launched in San Francisco.
  - As of April 2015 had approximately 200 employees.
  - Instacart customers had the option to leave a gratuity in exchange for a service fee that would be used to pay its workers/shoppers.
  - Acquired Toronto based Unata, a white label grocers' platform for $65 million in January 2018.
  - Raised $800 million in funding during 2018. Instacart valued at $7.6 billion.

- National expansion with retailers Walmart Canada, Staples Canada, M&M Food Market, Kroger, Aldi, Sam's Club, Publix and Costco during 2018.
- National expansion of Instacart Pick-up during 2018. Instacart Pick-up is a click and collect service. Customers pick-up their orders at the grocery store.
- Raised an additional $271 million at the end of 2018.
- Expansion of same-day alcohol delivery service in the United States during March 2019.
- February 2020 Instacart had approximately 142,000 employees.
- Hired an additional 300,000 workers from mid-March 2020 to mid-April 2020 to meet demand for grocery deliveries due to the pandemic.
- May 2020 began a partnership with Rite-Aid, offering services across 2,400 locations in 18 states.
- June 2020 raised $225 million. Additional retailers C&S Wholesale Grocers and Staples US.
- October 2020 raised $200 million. Valuation of $17.7 billion.
- January 2021 lay off nearly 2,000 employees.
- March 2021 raised $265 million. Valuation of $39 billion.

- Advantages:
  - Frees up time to do other things while your shopping is performed by someone else.
  - Health benefits, no need to be in a crowded grocery stores and warehouse stores (Costco).
  - Can do online shopping any time of the day, even when the store is closed.

- Disadvantages:
  - Items that are picked are not always your personal preference (fruits, vegetables and meats).
  - Costly, service fees and processing fees.
  - No opportunity to browse to see new/different products.
  - Requires advanced planning.
  - Limited availability of shoppers/appointments.

B. Curbside Pickup

- Background: Customer makes a purchase remotely through e-commerce and picks up the order without physically entering the store. A safe way to skip the shipping costs. Also is a way for a customer to visit their favorite retailers without the need to enter a potentially crowed store, avoid the need to wait for or pay for delivery. Great combination between convenience and speed allows shoppers to fit pick up into their busy schedules. *See also* Shipt (used by Target); Fresh Direct (NE Regional) (grocery delivery services by mail).

- Advantages:
  - Helps some businesses keep delivering with store locations closed.
  - Protects the safety of customers and employees.
  - Employees can do other jobs and help decrease labor costs.
  - Retailers save on shipping costs.
  - Convenience of curbside pickup helps boost sales.
  - Decrease in-store lines.
  - Allows customers to get products faster and on their time schedule.
  - Shoppers have the ability to visually view their purchase, undamaged, size, color.
  - Reduces stress and friction.

- Disadvantages:
  - Customers never visit your store, no opportunity to purchase other items. No impulse purchases.
  - Hard to be efficient when the store location is busy.
  - Requires a well-functioning, shopper friendly app.
  - Inventory challenges to track in real time.

C. Social Media

- Background: Interactive technologies that allow the creation and sharing and exchange of information, ideas, interests via a virtual communities and networks. Shoppers are becoming more like detectives and are looking for retailers that meet their expectations and standards. A social media strategy is essential for increasing in store and online sales, the building of customer relationships and the establishing of a retailer's brand. Examples of social media sites and networks are Facebook, YouTube, Instagram, TikTok, Twitter, Pinterest, Snapchat, The Mom Edit, influencers and bloggers too. Shoppers visit their preferred social media sites multiple times a day and their shopping choices are influenced by what they see. Advertising is also targeted based on shopping habits and browsing history.

- Advantages:
  - Customer data analysis.
  - Increased brand awareness.
  - Better customer satisfaction.

- Cost effective.
- Increased inbound traffic.
- Gain market insight.

- **Disadvantages:**
  - Exposure to your competitors.
  - Need qualified personnel.
  - Slow returns on investments.
  - Tarnish brand name.
  - Time Consuming.

D. The High-tech Fitting Room

- **Background:** Avoids the hassle of trying the clothes on, the shopper can put them on virtually on a mirror. Virtual fitting rooms use a video recording of the shopper. Smart phones can be used, they are portable, owned by shopper, and have a camera and a screen to view the virtual items.[4]

- **Advantages:**
  - Customers can shop remotely.
  - Experience closer to the in-store experience.
  - Put clothes on virtually on a mirror.
  - Creates a connection with the customer.
  - Can see types of cuts and styles.
  - Buy directly through the mirror.

- **Disadvantages:**
  - Realism and precision is an issue and the technology is advancing.
  - Customers can feel turned off by the sale.
  - Customers prefer traditional fitting rooms to find and try on items.

IV. The Warehouse Boom

- **Background:** A recent report from CBRE estimates that the U.S. will need to add approximately 330 million square feet of warehouse space dedicated to fulfillment by 2025 to meet the demand of e-commerce.[5] This estimate is

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[4] See Lauren Thomas, Shuttered Fitting Rooms Anger Shoppers and Boost Returns. How These Retailers are Trying to Fix That. (July 6, 2021), https://www.cnbc.com/2021/07/06/retailers-try-to-solve-the-fitting-room-dilemma-as-online-sales-grow.html (last viewed July 9, 2021).

[5] Matt Leonard, US Needs 330M Square Feet of Warehouse Space to Keep Up with E-Commerce: CBRE, Supply Chain Dive (June 23, 2021), https://www.supplychaindive.com/news/warehouse-ecommerce-construction-fulfillment-center/602266/; see also Jennifer Smith, Warehouse Rents

based on e-commerce increasing to account for 26% of all U.S. retail during this period.[6] During the same period, based on a projected increase of $1.5 trillion in e-commerce sales globally—to $3.9 trillion in total—an additional 1.5 billion square feet of warehouse space will be needed worldwide.[7]

- Trends:
  - According to Prologis—one of Amazon's largest landlords and the world's largest owner of industrial real estate—in Q1 of 2021, 25% of new lease signings for warehouse space were related to e-commerce.[8]
  - In 2020 and 2021, Prologis expanded its warehouse portfolio significantly from approximately 800 million square feet to nearly 1 billion square feet of owned and leasable space.[9]
  - Blackstone recently invested $100 billion in warehousing, citing e-commerce growth as the primary motivating market factor and the "number one theme at the firm[.]"[10]
  - Traditional retailers are scaling down their brick and mortar real estate, which traditionally held the majority of inventory—and opting to use nearby fulfillment centers to quickly restock their storefronts.[11]
  - Store fronts in defunct malls are being considered for and converted to warehouse fulfillment centers, albeit at a lower rate than many had anticipated.[12]
  - Aside from the need for e-commerce fulfillment space, traditional commercial real estate is being transformed into server processor

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Surge on Bidding Wars for Scarce Space, The Wall Street Journal (June 22, 2021, https://www.wsj.com/articles/warehouse-rents-surge-on-bidding-wars-for-scarce-space-11624386011.

[6] Id. (based on data from market researcher Euromonitor International).

[7] Id.

[8] Id.

[9] Joshua Chaffin, Amazon's Landlord Doubles Down on Vast Ecommerce Warehouses, Financial Times (June 29, 2021), https://www.ft.com/content/5da94e4f-7e05-429b-ae42-d837b817d4c4.

[10] Id.

[11] Raychel Lean, 'There's Just Not Enough Warehouse Space': Florida Enjoying Industrial Sector Boom, Daily Business Review (June 7, 2021), https://www.law.com/dailybusinessreview/2021/06/07/theres-just-not-enough-warehouse-space-florida-enjoying-industrial-sector-boom/?printer-friendly.

[12] See Chaffin, Lean.

storage units to address the needs of operating a digital economy (i.e., EFTs).[13]

  - First-year base rents for warehousing in Northern New Jersey jumped by approximately 33% year-over-year through May 2021, while those in Southern California's Inland Empire rose 24.1%.[14]

- Implications:
  - Warehouses built to address the needs of e-commerce are different from traditional warehouses, requiring additional parking, greater height clearances, increased access to power and ventilation, larger numbers of loading docks,[15] and additional space to handle returns.[16]
  - Given the supply chain issues exposed by the pandemic, retailers, both e-commerce and traditional, are likely to increase the size of their inventories to prevent any such issues from arising in the future.[17]
  - Wage and labor costs in manufacturing have increased substantially—from 5% to 20% percent—due to COVID-19-related factors (overtime, low worker supply).
  - Real estate prices continue to climb, as warehouse vacancies are virtually non-existent in various regions,[18] with prices for logistics space near ports and major cities increasing at a particularly strong rate.[19]
  - The demand for larger buildings that can handle a large e-commerce labor force is pushing warehouse development to secondary markets just outside of major cities.[20]

In the aftermath of the COVID-19 pandemic we have learned nothing is certain. The world is starting to open up, it has never been more important for the retailers to provide best in

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13 Id.

14 Id.

15 See Leonard.

16 See Lean; see also George Hammond and Harry Dempsey, Online Shopping Boom in Pandemic Drives Demand for Warehouse Space, Financial Times (June 22, 2021), https://www.ft.com/content/1ddf26ac-6bf5-4fb0-bdec-8ab70d61197f, ("Goods purchased online require around three times the logistics space [as physical stores]").

17 Id. see also Smith.

18 See Lean.

19 Smith.

20 See Lean.

class experiences no matter how shoppers choose to interact with the retailer. Consistent and attractive experiences with the retailer needs to be across email, mobile, website and the next best thing in social media and the internet.

V. What does the Future Hold for Retail?

A. *The Future of Retail*

1. "Phygital Experience"

- Physical stores will not go away, but will instead morph into high touch, sensory experiences.
- Technology innovation to contactless payments, reduced touchpoints.
- In-store digital experience driven by data and AI.

2. Retailers

- Retailers will have to provide personalized offers and experiences, often with a localized flavor.
- Driven by data.
- The goal will be to contact online consumers with in-store staff.

3. Blended Retail Experience

- Stores with larger footprints will become "mini malls".
    - For example, Target has created a larger Apple area in its stores, which draws customers in. Target also offers CVS branded pharmacies and Starbucks.
    - Kohl's/Amazon return center.
    - Dollar General added a vaccine center in some stores during the pandemic; it is now expanding health-care related items in stores.[21]
- Stores will create a phased shopping experience.
    - Transactional hub (i.e., physical store) for immediate consumption and to provide an experiential venue/showroom.
    - Online presence for e-commerce.
    - Distribution point/e-commerce fulfillment/curbside or drive-up.
    - Examples—Nike, Starbucks.

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[21] See Melissa Repko, Dollar General Hires Chief Medical Officer at it Looks to Become a Health-Care Destination in Rural Areas, (July 7, 2021), https://www.cnbc.com/2021/07/07/dollar-general-hires-chief-medical-officer-boosts-health-care-items.html?&qsearchterm=melissa%20repko%20dollar%20general (last viewed July 9, 2021).

4. Smart Supply Chain
   - Supply will no longer be determined by a buyer and market predictions. This leads to tremendous waste.
   - Supply will be based on data analytics. Retailers will integrate supplier and customer data through AI to determine purchase strategies and eliminate waste.
   - Warehouse innovations, closer to the consumer, more coordinated logistics.
   - Drone deliveries.

5. Omnichannel Social Commerce
   - Retail will rely on multiple channels to sell goods—example The Mom Edit and other "influencers" pushing the brands for hire by retailers on social media; also direct purchasing on social media.
   - The end goal is "social commerce"—the idea that goods will be sold on a highly personalized basis through social media platforms (existing and to-be-developed).

B. The Future of Store Formats

1. Small Stores
   - Stores will have smaller footprints.
   - Even traditionally "big box" stores will open small retail outlets to build brand connection
     - "IKEA City" stores.
     - Bloomies by Bloomingdale's[22]
     - Market by Macy's
     - Nordstrom Local

2. Demonstration Stores
   - Nothing is sold in demonstration store; everything is shipped.
   - Creates the "phygital" experience.
   - The concept is similar to what we see in furniture stores today—you can see and touch the merchandise, but you can't walk out of the store with it.

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[22] See Lauren Thomas, Bloomingdale's is Getting Ready to Open its First-Ever Bloomie's Store. Here's a Look Inside, July 7, 2021, https://www.cnbc.com/2021/07/07/bloomingdales-is-getting-ready-to-open-its-first-ever-bloomies-store.html (last viewed July 9, 2021).

3. Pop-up Stores
   - These are stores that are open for a short-time and have high visibility.
   - Because they are temporary and usually occupy otherwise empty spaces, they are lower cost.
   - They add a sense of urgency to the shopping experience and re-instill the emotional aspect of shopping.
   - Often used in conjunction with limited editions or limited runs.
   - Examples—Armani store in Paris; Louis Vuitton in Soho; Target with various high-end designers.

4. Rental Stores/Pro Stores
   - An expansion of the concept currently used by Lowe's and Home Depot—we will rent you the higher ticket item (such as the equipment for a DIY project) and sell you the other things you'll need.
   - Websites designated for contractors and businesses with supplies for large-scale projects.
     - Build.com
     - HDSupply.com[23]

5. Repair Stores/Second-Hand Stores
   - Appeals to the "sustainability" minded.
   - Stores will offer repair services and sale of certain second-hand items.
   - Examples—IKEA (of course), H&M (clothing repair and rental of high-priced special occasion items).

6. Experiential Stores
   - No sales, just experiences.
   - Different from demonstration stores in that they are not necessarily trying to sell a specific product but only to develop a connection between the consumer and the brand.
   - Examples—Niketown, Samsung 837, American Girl Stores.

7. "Grocerant"
   - As the name implies, a grocery store that offers restaurant service.

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[23] Melissa Repko, Home Depot, Lowes Amp Up Focus on Home Pros, as Consumers Swap DIY Projects for Parties, Travel, July 6, 2021, https://www.cnbc.com/2021/07/06/home-depot-lowes-turn-focus-to-home-professionals-to-propel-growth-.html?&qsearchterm=home%20depot%20hd%20supply (last viewed July 9, 2021).

- Stores like Wegmans and Whole Foods currently offer seating areas, but the "grocerant" concept expands on that idea to add counter and/or table service.
- Stores like Publix have a sandwich store within the store.
- Used by Southern Season (no longer in business—chapter 11 bankruptcy converted to a 7).

8. Store as a Service
   - Stores will evolve to offer an outlet for manufacturers (particularly small manufacturers).
   - Rather than the store controlling a product's placement and merchandising, the manufacturer retains control. Products are displayed with a video screen next to it with information provided and controlled by the manufacturer.

C. Open Questions on the Future

1. How long will the minimum wage worker be scarce? Will wage pressure force a change in the use of labor?

2. What is the potential impact of continued increased prices and inflation risk coupled with an increasing scarcity of goods (lumber, copper, household goods)?

3. Will rents go down? Will landlords continue to permit flexibility or rents based on sales?

4. Will the average consumer have different needs and desires after return to work gets underway? Will retailers be able to respond?

5. What impact will ongoing scarcity of supplies or goods have on retail?

   i. Supply chain issues
   ii. Psychological impact on the consumer

6. Do you believe that retail's "just in time" habits will be forever altered?

7. Which innovations discussed have enhanced or improved your retail experience?