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2020: Changes in the Courtroom, the Office, and the Industry

by Sarah Link Schultz and Rachel Biblo Block

This year has tested the restructuring industry in unprecedented ways, and the typically rigid industry has responded with unexpected but necessary elasticity that should be a guiding light for other specialties in the legal field. Courtroom and restructuring professionals have embraced change while also recognizing that the goals have not changed but have perhaps become more challenging in the new virtual-centric environment. This article will explore these changes—changes in the courtroom, the office, and the restructuring industry—resulting from the global pandemic and hypothesize whether some may become the new norm.

Short-Term Changes Making Immediate Impact and New Questions

Beginning in March of this year, we have seen certain short-term changes make an immediate impact. Bankruptcy courts and judges have gone to new lengths and granted new relief, in an effort to help already distressed companies during an unprecedented financial crisis. For example, in Pier 1 Imports, Inc.'s bankruptcy case in the Eastern District of Virginia, the debtors sought extraordinary relief after realizing their anticipated ninety-day stay in bankruptcy would be much longer as a result of the pandemic. The debtors asked the court for authority to delay the payment of certain rent obligations, despite Bankruptcy Code section 365(d)(3)'s contrary mandate that "[t]he trustee shall timely perform all the obligations of the debtor . . . under any unexpired lease of nonresidential real property". The court "recognize[d] the extraordinary nature of the relief it was asked to provide" and relied on its "broad equitable power" under Bankruptcy Code section 105 during an "unprecedented financial crisis" to provide that relief. See Case No. 20-30805, Docket No. 637 at p. 7, n.7.

The Pier 1 Imports, Inc. debtors were not alone. Similar relief was sought and granted in, among other cases, Modell's Sporting Goods, Inc.'s bankruptcy case in the District of New Jersey, where the court granted an emergency motion to suspend temporarily the debtors' chapter 11 cases (Case No. 20-14179, Docket Nos. 115, 116) and CraftWorks Parent, LLC's bankruptcy case in the District of Delaware, where the court approved the debtors' seven-week budget that did not include rent payments (Case No. 20-10475, Docket Nos. 206, 247).

In addition to granting extraordinary relief, courts have

extended their workdays and workweeks to accommodate debtors and their stakeholders. On Saturday, May 16, 2020, the Honorable Judge David R. Jones held a first day hearing in J.C. Penney Company, Inc.'s bankruptcy case in the Southern District of Texas, which the debtors' counsel regarded as "mak[ing] history" and "probably the first time that there's a first day hearing on Saturday." Case No. 20-20182, Docket No. 130 at 10:14, 15-16. To which Judge Jones acknowledged the gravity of the circumstances and responded that "[t]here are 97,000 people that need our attention or thereabouts." *Id.* at 10:19-20.

While courts and restructuring professionals alike have gone above and beyond during this pandemic, both face novel questions that cannot be readily answered. One such question relates to feasibility. Bankruptcy Code section 1129(a)(11) provides that a court "shall confirm a plan only if . . . (11) [c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor". In the midst of a global pandemic, restructuring professionals face a quandary with this confirmation requirement. Their usual asymmetrical information advantage has largely disappeared and accurately predicting the future seems more difficult than ever. In many cases, this uncertainty means companies need more time to restructuring effectively and wait out the pandemic. There is money in the market to be deployed to distressed companies, but how much time will lenders and other stakeholders give any particular company to reorganize? To answer this question, distressed companies, lenders, and other stakeholders must confront (earlier and more directly) an existential question: Is there a defensible business behind the debtor? These questions with only imperfect answers and rough predictions are generally making restructuring more difficult.

Long-Term Changes Accelerated by Pandemic

The retail industry seems to be confronting these questions to a heightened degree during this pandemic, as everyone tries to determine where the bottom is and when business and consumer activity will stabilize. Brick and mortar retailers faced real financial issues before the pandemic with the increasing prominence and dominance of online shopping. But lenders and other stakeholders seemed more willing to throw one last lifeline to a distressed retailer. Those lifelines are harder to come by during the pandemic. While the pandemic may not have fundamentally shifted consumer behavior, the pandemic has accelerated existing trends that have forced retailers with significant retail footprints—J. Crew, Neiman Marcus, JCPenney, Brooks Brothers, and Century 21, to name a few—to seek the shield of chapter 11. In these cases, landlords have become key stakeholders whose fate is uniquely tied to each debtor's fate. When the scale tips from reorganization to liquidation, landlords are particularly affected, and they have responded with new perspectives. Landlords have started rethinking and restructuring leases, favoring a flat rate over rates tied to revenue, and re-envisioning malls as showrooms instead of shops.

While restructuring professionals are generally predicting greater consolidation, noting that big businesses and mom and pops alike are struggling to outlive the pandemic, they also remember the general resilience of businesses and consumers after past crises with similar uncertainties. The uncertainties that mark this year, however, are compounded by new challenges brought about by restructuring companies virtually. The pandemic has changed the primary means by which restructuring professionals work with their clients, transforming face-to-face interactions into virtual interactions. A new level of intentionality has been injected into the client relationship and legal strategy. Building a rapport with, and earning the trust of, clients virtually requires video conferencing, more frequent calls, and corresponding schedules. Having the tough conversations, and making the tough decisions, with clients must be more carefully crafted and deliberately

staged. On the other hand, building consensus with adversaries has generally become more difficult because parties are not humanized by sitting in one room at one table together and are not able to negotiate a last-minute deal on the physical courthouse steps.

Pandemic Has Affected the System

The new virtual environment, while peppered with challenges, has presented the industry with valuable opportunities to increase access to, and reduce the costs of, the system. Parties located far away from the physical courtroom are now participating because of the courts' use of video conferencing for hearings. These parties are participating as witnesses, observers, learners, and everything in between, and clients and the restructuring industry as a whole are benefitting. This increased access to the court and the restructuring process as a result of technology and decreased costs is a welcome development, and restructuring professionals and bankruptcy judges have indicated a desire to continue this, in some fashion, going forward when courtrooms reopen.

This new environment has also accelerated workforce changes and pushed an industry generally resistant to change to move towards the inevitable future of legal practice. The restructuring industry's elder statesmen, particularly those who remember a world of law firm libraries full of hard copy books and sleeping at the office for days on end, have been forced to acknowledge that, while maybe not the ideal, working remotely can work. The days of spending months at the client's offices leading up to a filing and flying to first day hearings on two days' notice may be gone or at least different after the pandemic. This is in large part because during this pandemic, companies are restructuring; attorneys, financial advisors, and investment bankers are facilitating those restructurings; and courts are blessing those restructurings.

With this new environment comes new opportunities to welcome diverse talent previously deterred by the endless work-related travel required of restructuring professionals but also new responsibilities, particularly for the industry's leaders. Just as client interactions during this time require increased intentionality, so do inter-office interactions. This demands new creativity to build team cohesion, to mentor, and to find opportunities for junior attorneys with clients, in the courtroom, and to develop business. Leaders must lead now more than ever.

Lasting Systemic Change in a Traditional Industry

And while being in the trenches of restructuring during this pandemic has meant experiencing change and uncertainty, past financial crises have shown us the real likelihood of an eventual return to normalization. With all the pain experienced this year, that is reassuring. We have to ponder, however, whether it is best for the restructuring industry to return completely to pre-pandemic times. We miss face-to-face interactions with clients and colleagues and the veneration of actually appearing in the courtroom. Those are highlights of the job. But the flexibility, compassion, increased participation, and creativity that have marked the restructuring industry this year should stay and facilitate systemic change that brings greater access, diversity, understanding, and ultimately, success to the industry. ¤

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