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Year in Review

by Christopher Patalinghug

Commercial Chapter 11 bankruptcy filings for the first 11 months of this year rose 22% compared to calendar year 2019, according to data from American Bankruptcy Institute and Epiq Systems, Inc. In addition, commercial Chapter 11 filings through November are already up 23% from calendar year 2018 and 17% from three years ago. Data refined by *Troubled Company Reporter* editors, to exclude contemporaneously filed cases being jointly administered, show that about 1,764 of the corporate Chapter 11 cases filed through December 20, 2020, involved debtors with more than $1 million in assets. According to TCR, there were 1,914 corporate Chapter 11 filings by debtors with more than $1 million

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Virtual-Centric Environment Here to Stay?

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. The authors explore these changes—in the courtroom, the office, and the restructuring industry—resulting from the global pandemic

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in assets in 2019, 1,719 in 2018 and 1,836 three years ago.

Year	Total Commercial Chapter 11 Filings
2020 (YTD)	6,723
2019	5,518
2018	5,518
2017	5,762

Source: ABI

In contrast, through November 2020, total U.S. bankruptcies are down 35% compared to calendar year 2019, a steep drop from total filings in each of the past three years. After declining for eight consecutive years, total bankruptcy filings for 2019 slightly increased 0.28% from 2018. According to ABI, the 494,756 total bankruptcies through November are on pace to result in the lowest annual filing total since the 617,660 filings recorded in calendar year 2006, the year after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 went into effect and placed new requirements on filers.

Year	Total US Bankruptcies
2020 (YTD)	494,756
2019	757,497
2018	755,353
2017	766,761

Source: ABI

ABI Executive Director Amy Quackenboss explains government relief programs, moratoriums and lender deferments have helped families and businesses weather surging COVID-19 cases, elevated unemployment rates and growing debt loads to this point of the pandemic. "Unless renewed by Congress, the expiration of the stabilization programs will leave struggling consumers and businesses in a challenging and uncertain position. Bankruptcy provides a proven shield to companies and consumers facing mounting financial distress," she says.

Statistics released in late October by the Administrative Office of the U.S. Courts affirms this downward trend. Despite continued high unemployment related to the COVID-19 pandemic, personal and business bankruptcy filings fell 21.1% for the 12-month period ending Sept. 30, 2020, falling sharply for the second straight quarter. Bankruptcy filings totaled 612,561, compared with 776,674 cases in the year ending Sept. 30, 2019, according to the Judiciary report. Bankruptcy filings fell 11.8% for the 12-month period ending June 30, 2020. The months of April to June this year coincided with the first wave of COVID-19 in the United States, as well as a spike in unemployment claims.

The Judiciary report, however, notes bankruptcy filings tend to escalate gradually after an economic downturn begins. Following the Great Recession that began in 2007, new filings escalated over a two-year period until they peaked in 2010. Some filing activity also may have been affected by pandemic-related disruptions to bankruptcy courts, many of which have had limited public building access since mid-March.

Beyond the numbers, how was the restructuring activity this year, especially against the backdrop of the COVID-19 pandemic that has now claimed over a million lives worldwide and continues to disrupt economies? We ask several restructuring experts to reflect on the significant events in the past year: the **Hon. Melanie L. Cyganowski** (Ret.), E.D.N.Y. Chief Bankruptcy Judge and now Chair of the Restructuring Department at Otterbourg P.C.; Kirkland & Ellis restructuring partners **Aparna Yenamandra** and **Ryan Blaine Bennett**; **Jonathan Carson** and **Eric Kurtzman**, Co-CEOs of bankruptcy administration and technology firm Stretto; **Morris S. Bauer** and **Melissa A. Peña**, Members at Norris McLaughlin; **Allen Wilen**, the National Director of EisnerAmper's Financial Advisory Services Group; **Kate McGlynn** and **David Orlofsky**, Managing Directors at AlixPartners' Turnaround & Restructuring Practice; **Dan Dooley**, Principal and CEO at MorrisAnderson; and **Paul Leake**, global head of corporate restructuring practice at Skadden, Arps, Slate, Meagher & Flom LLP, and partners **Shana Elberg**, **Lisa Laukitis** and **Christine Okike**.

The COVID-19 pandemic is probably the single most important story of 2020. How has your firm

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adjusted to this major health crisis? What's the new normal like for you and your firm?

Hon. Melanie L. Cyganowski (Ret.): COVID-19 is the most important story of 2020 bar none, and most likely in 2021. The contours and timing of a return to normalcy continue to develop. Fortunately, Otterbourg has adjusted to the challenges posed by the pandemic. We have successfully shifted from an office-centered practice to working online from our respective individual locations. The Firm has been fortunate to have a strong, adaptive, and responsive leadership at its helm. Just as important is the behind the scenes work of the firm's IT department and frequent technology upgrades to adapt to the multi-fold increase in remote access during the pandemic. Effective leadership and infrastructure make a huge difference for clients and lawyers alike.

Aparna Yenamandra, Kirkland: We went from being an office where most partners and associates (and support staff) came in every day unless they were traveling on business, to suddenly all being at home virtually overnight. The first hurdle was working to stay in contact with each other in the same way and to the same extent as we did pre-COVID, and we addressed that through regular group-wide and small-group Zoom sessions. The second hurdle was definitely negotiating significant (and complicated) restructuring transactions without ever having in-person meetings, and then subsequently prepping and filing cases remotely but we quickly got the hang of all of that as well. The third hurdle was having court hearings and depositions remotely, and learning how to use the new remote technology. By the end of the summer we had found our new normal on interacting with each other, other advisors, our clients, and the court remotely.

Eric Kurtzman, Stretto: The COVID-19 pandemic brought Stretto both expansion opportunities and business challenges. As an administrative services and bankruptcy technology partner to fiduciaries across the industry, the company's operating model was designed to maintain business continuity. While our case-management experts utilized cloud-based technology, the uptick in Chapter 11 filings fueled the growth of this service line. We quickly scaled our corporate restructuring services by adding personnel capable of working from home across the country. As more law firms turned to Stretto to fulfill their print-production and legal noticing needs due to their own remote working conditions, we leveraged our in-house facilities designed specifically for bankruptcy cases.

On the Chapter 7 side of the business, we're managing dueling headwinds due to decreased consumer-bankruptcy filings and a low interest-rate environment for the entirety of 2020. For the tens of thousands of bankruptcy attorneys who utilize our case-preparation and filing software, we've expanded our suite of administrative services to meet their needs during the pandemic such as offering temporary administrative staff support, eliminating the need for them to scale their own personnel to meet the ebb and flow of their practices during these uncertain times.

Morris S. Bauer and **Melissa A. Peña, Norris McLaughlin:** Our attorneys and staff exhibited a great deal of resilience this year. We have learned to work remotely and have done so effectively. While there were concerns on how we would manage in March of 2020, we have successfully transferred our practice to a remote practice and have continued to service our clients. The firm has performed better than expected in the early days of the pandemic. The pandemic has not hindered our strategic efforts to grow. Firmwide, we have hired five new lateral partners since the pandemic started and continue to interview prospects.

As with all firms, we are continuing to monitor the economic impact caused by the pandemic so that we may strengthen our presence in certain practice areas. We have seen an uptick in litigation, employment, real estate, mergers & acquisition, and trust and estate work. We anticipate legal work in the mid-market to small market bankruptcy/workout/creditors rights arena to increase significantly by the

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second quarter of 2021.

Our management team has positioned us to be ready, willing, and able to serve, support and satisfy the legal needs of our clients.

Dan Dooley, MorrisAnderson: We re-started consultant travel to client sites in June although some clients are partially working remotely. For consultants travelling, we pay for COVID tests weekly or bi-weekly as appropriate at a cost of $100/test.

Referral source marketing has ground to a halt as almost no one wants to meet in person.

Allen Wilen, EisnerAmper: When companies are in crisis, restructuring professionals travel to wherever we're needed. So for us, the new normal is working remotely rather than being on site for a restructuring. Our team has responded rather nimbly, and we have traded hopping on a plane for our home offices and working on a virtual basis. We have become proficient with video conferencing—the ballooning use of Zoom and Microsoft Teams has changed the way we interact with clients and staff. My biggest concern, once the health crisis is over, is whether remote work will become permanent or if we'll go back to working across the table from each other. We've already seen major companies choose to remain working remotely to increase efficiencies and reduce rent expense, so my concern is will clients come back to their offices. And, will restructuring professionals be willing to travel when norms permit? The challenge will be helping both staff and clients navigate these changes.

Kate McGlynn and David Orlofsky, AlixPartners: While we didn't have much choice regarding remote work and remote client engagements everyone quickly adapted to the new normal seamlessly. Both internally at AlixPartners and externally with our clients everyone has stepped up and shown true leadership through uncertainty and chaos. Many of us wondered how we would be able to effectively work remotely and still provide significant value to our clients. Over the last several months, we have helped clients stabilize business operations, successfully started new engagements without ever meeting the client in person, prepared and filed companies for bankruptcy, attended and participated in virtual bankruptcy hearings and sale auctions, assisted with M&A diligence, and onboarded new colleagues virtually. All this work has been done using video conferencing software that pre-pandemic we seldom felt the need to use.

Although we are still evaluating what the new normal will look like, we have now proven that we can effectively perform some of our work remotely. This will allow us to continue delivering excellent results for our clients but also give our people some flexibility.

In-person meetings won't go away, and in some cases, we think certain aspects of our work is done more efficiently and effectively in person. There will be a certain amount of travel for business but likely less than before and we think that applies to the entire restructuring industry.

Shana Elberg, Skadden: Skadden has done a great job all-around adjusting to the new (albeit, hopefully temporary) norm. Technology (software and hardware) resources were mostly in place to work fully remotely, but certain features were rarely used (Webex, Zoom, etc.) prior to the pandemic and the firm quickly made sure everyone had what they needed to fully function outside of their traditional offices. More importantly, I think, the firm has been making sure we all remain connected to each other on a regular basis, that everyone feels informed of happenings around the firm and, most importantly, making sure individuals are able to balance work/life in an entirely new way.

Overall, what did the restructuring activity look like this year?

Cyganowski: Our responsive and client-focused attorneys have enabled the Firm to be involved in a large number of high-profile cases, particularly in the retail, mass torts, health care, and construction sectors. Otterbourg's representations included secured lenders in a busy restructuring market, which led to participating in household-name bankruptcies, such as JCPenny, Modell's, Stein Mart, RTW Retailwinds (aka Lerner New York / New York & Company), and Le Tote

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(aka Lord & Taylor). Additionally, we saw an increase in our activity in representing key constituents in national mass tort and health care bankruptcies. We served as Co-Counsel to the Ad Hoc Committee of Governmental and Other Contingent Litigation Claimants in the Purdue Pharma bankruptcy.

Yenamandra: This was a super busy, active year. We saw a lot of movement and activity in the E&P space, as commodity prices continued to fluctuate wildly in the wake of the pandemic. We obviously saw a lot of retail filings, as companies complied with governmental closure orders after already battling the Amazon effect for years. We saw a lot of activity in the gym/movie theater/ hospitality/entertainment space, as it became clear that we were looking at closures for a significant period of time. Finally, we saw a lot of activity (and will continue to see activity) with respect to consumer-facing businesses, given the uncertainty around the volume of consumer activity this year and next. Ultimately, there were not many industries that didn't at least contemplate needing to do some kind of in-court or out-of-court restructuring as a result of the pandemic.

Jonathan Carson, Stretto: Compared to 2019, Q1 2020 was a continuation of last year's tepid pace of corporate restructurings. Once the pandemic took hold in March of this year, it became the catalyst for over-leveraged companies to fail which resulted in an uptick of Chapter 11 filings. More major retailers and restaurant chains filed for bankruptcy in the first nine months of 2020 than all of 2019.

Professional-service providers such as Stretto also saw a marked difference in business resulting from the pandemic-induced restructurings this year. For example, Stretto managed 20 cases in Q2 2020, compared to five cases in Q2 2019. The increased year-over-year pace continued into Q3 as we handled more than double the number of cases in 2020 from 2019.

Bauer/Peña: Prior to the COVID-19 pandemic, large retailers were already in distress as a result of growing competition from ecommerce retailers like Amazon. Prior to the pandemic, Modell's Sporting Goods and Pier 1 Imports filed liquidating Chapter 11 cases. The pandemic accelerated filings by other distressed retailers because of the forced shopping mall closures impact on revenues. Those that survived changed owners. In some instances, the new owners are the lenders through a debt for equity swap or a consortium that included the mall owners. Under both scenarios, the surviving locations are those that were profitable before the pandemic with the Chapter 11 being used to terminate leases at those locations that were not profitable and to effectuate the new ownership with a clean balance sheet.

As with the retail cases, prior to the COVID-19 pandemic, there was already financial distress in the gas, oil and energy industry. Energy commodity prices were declining and energy prices were slumping. Both required the use of Chapter 11 to infuse cash and restructure top level debt.

The middle-market and small company filings have been stagnant. The need to file for bankruptcy has been delayed due to the following: state court moratoriums; the government providing various loans; landlords and lenders making certain concessions; and businesses reducing their workforce and analyzing future revenues and expenditures. In each instance, counsel is being used as a sounding board exploring legal rights and remedies that can be used down the road and the possible outcomes. These discussions include business viability, the hypothetical outcome of a liquidation, possible sale or merger of the business, restructuring loan and lease terms, the utilization of the new Subchapter V and when to take that step. In a closely held business, these discussions have also involved the resulting implications to the principal of the business, who may have guaranteed the company's loans and leases.

At a certain point, financial institutions and landlords will be free to pursue deferred obligations. Those businesses with sustained revenues, cash, or access to cash by way of equity capital or a new lender will survive. Those without will require a merger partner or be liquidated. The mid-market to small market

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company's management is being tested as to their ability to manage cash through one of the most trying times in economic history. At some point in the future, when businesses return to a "new" normal, a formal restructuring will likely be required.

Dooley: Strong thru Q2 and then deal flow dried up in Q3 and Q4 with PPP loans, 6-month bank loan downgrade moratoriums and bank's reluctance to be aggressive against PPP loan recipients.

Wilen: Our firm has continued to be exceptionally active in the marketplace and we have benefited from several large engagements with longer engagement lengths than usual. In recent years, many restructuring engagements were of a shorter duration and practice leaders were dedicating more of their time to prospecting to keep existing staff busy. We have also benefited from our leading middle-market position where client engagements are typically longer. Lastly, our focus has been on healthcare and nonprofits as major components of our work and there is no end in sight for the growth of restructuring for either industry.

McGlynn/Orlofsky: Two industries that stood out this year were retail and oil & gas. In these and other sectors, disruption was occurring long before the pandemic. Then, COVID-19 hit, which exposed and magnified the disruptive forces that were impacting these industries. In addition, we saw companies that were outside these troubled sectors and were generally viewed as healthy before the pandemic. These companies were acutely impacted by COVID-19 and are now trying to outlast the crisis. Depending on how long the pandemic lasts, some of them are likely to run out of liquidity. For many of these companies, limited operations and forced shutdowns have had a severe impact. These industries include hospitality, entertainment, travel & leisure, retail, and certain parts of the real estate sector to name a few.

Paul Leake, Skadden: While this year definitely saw a significant uptick in restructuring work, the overall number of bankruptcy filings, especially on the consumer side, did not meet the end-of-days forecasts that some expected back in March. Two reasons may be attributable to the less-than-anticipated restructuring activity.

First, the unprecedented level of support from Congress and the Federal Reserve. The CARES Act authorized more than $2 trillion to battle the economic effects of COVID, and the Federal Reserve agreed to buy up to $500 billion in bonds issued by large companies. Second, many companies actively sought to shore up their balance sheets and proactively address their potential liquidity shortfalls given the pandemic. In that vein, companies maxed out their revolvers and aggressively accessed the capital markets for additional liquidity. Indeed, Skadden's capital markets group had one of its busiest years ever in 2020.

Even with the government's vital lifelines and the various liquidity management strategies employed by many companies, this year still saw a sizable increase in Chapter 11 cases. Chapter 11 filings were up 26% through the first half of the year, and, as of September, billion-dollar bankruptcy cases are up 171% over last year. Included among these Chapter 11 filings were many household name companies, such as Pier 1 Imports, Brooke Brothers, Chesapeake Energy, CEC Entertainment (Chuck E. Cheese), Hertz, Gold's Gym, JCPenney, J. Crew, Neiman Marcus, and Tailor Brands (parent company of Men's Wearhouse and JoS. A. Bank).

Which sectors remain vulnerable right now?

Cyganowski: Brick-and-mortar retail, real estate, travel and leisure sectors strike me as particularly vulnerable. COVID-19 exacerbated the already existing trend toward online shopping. The spate of bankruptcy filings by leading name brand retailers demonstrates the sector's vulnerabilities. As for real estate, both residential and commercial real estate remain in flux, with increased evictions and defaults realistic possibilities. As more employers and employees become comfortable with working remotely, we may see a permanent change in the office working structure, which would have a long term impact on office rentals. We also may be witnessing

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long term structural unemployment being a sad and lingering result of the pandemic. Regardless, until people feel safe and secure, hospitality and travel will likely continue to lag.

Yenamandra: Retail, E&P, hospitality, and travel remain vulnerable, among others. Certainly if the pandemic continues or there are delays in widespread distribution of a vaccine (or the efficacy of such a vaccine), a lot of companies that got through 2020 will be facing serious liquidity crunches in 2021. With other industries, like airline and hospitality, the name of the game will really be about staying power—companies that can survive a sustained downturn without facing traumatic liquidity crunches or loss of profit are the ones that will survive.

Carson: Due to the operating restrictions regional and local governments have implemented on businesses across the country to combat the rise of COVID-19 cases, certain consumer-based companies such as tourism, hospitality, travel, along with food and beverage establishments, face a great deal of uncertainty. If business restrictions remain in place for extended periods of time or become stricter, smaller businesses, and retail companies who rely more on brick-and-mortar locations versus ecommerce, may be vulnerable as well.

Bauer/Peña: Hospitality—hotels, restaurants and travel. Many of these businesses are highly leveraged and each have taken a significant revenue hit as a result of the pandemic. Debt restructuring, mergers, and closures are all conceivable future outcomes. Hotels and restaurants are franchised with large obligations paid to the franchisor. Many restaurants are closely held.

Airline industry—How long can an airline business manage its cash before a stimulus infusion, a merger or shut-down?

Retail—Retail falls into the following two categories: (i) the "big box" "big name" conglomerates like JC Penney, Macy's, Target, Kohl's, and (ii) the small retail business found on Main Street USA. The former will survive by evaluating on a store-by-store basis and restructuring top level debt. The latter's survival is more dependent on its ability to sustain revenue and obtain concessions and deferrals from their lenders and landlords. Surprisingly, revenue is coming back with the consumer being penned up by the pandemic and breaking out with a spending spree. Will it be sustainable?

Fitness Centers—Another predominately franchised-driven operation or closely held business. Its revenue is dependent upon members, many may be leery of using a gym while the pandemic persists. Survival will be dependent upon lender and landlord forgiveness and deferral. Even with concessions from their major creditors, the revenue may remain flat as members have replaced the gym with at home fitness equipment.

Transportation—Commuter trains and bus services have significantly dropped over the last year. Companies finding that "teleworking" works may not require employees to return to the office. Zoom has replaced the need for office face time. Other employees still wary of the pandemic may take private transportation. Even as the workforce returns to work, the industry will be forced to heighten cleaning procedures and reduce capacity for social distancing which comes at a cost. The future of this industry may be dependent on further government assistance.

Sports, performing arts, movie theaters and other leisure (amusements parks and casinos)—All of these sectors are driven by consumer attendance. In the short term, revenues are significantly down and this may lead to closures or immediate mergers. AMC theaters has just announced that it needs cash to survive and a competitor is already looking at the AMC locations as part of an acquisition. The first season after we return to the "new" normal will be determinative of the future survival or the need for a merger.

Office Real Estate and Shopping Centers—Similar to transportation, with teleworking and the increased on-line sales, both the office real estate and shopping centers will suffer. Companies will be reducing their office real estate and attempting to negotiate reduced rent. Some companies will cease to exist and vacate their office space. All of this will result in more office building

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foreclosures and make available discounted real estate. Similarly, shopping centers, which already were feeling the pain from on-line shopping, will continue to lose revenue, be subjected to foreclosures and discounted sales. Optimally located shopping centers may be able sustain their value by repositioning as warehouse space for the online retailers.

Dooley: The obvious ones—restaurants, hotels, retail, travel, aerospace.

Wilen: We feel there is great opportunity for restructuring in the healthcare, non-profit, retail, hospitality, and commercial real estate industries.

McGlynn/Orlofsky: Commercial real estate, in large cities like New York, is a sector with a lot of issues. You've already started to see some companies move to lower cost areas and that trend could continue. Also, many municipalities have a significant amount of debt and pension liabilities, and they will need to identify how to modify their operations in the new normal.

It will be interesting to see how behavior changes in the new normal and how much of the changes caused by the pandemic remain post crisis, which could have a long term effect on certain industries. For example, will people go back to gyms or will home fitness maintain its popularity, will people want to go to movie theaters or will they prefer to watch new releases at home, and when will people be allowed and/or feel comfortable eating inside a restaurant again?

Christine Okike, Skadden: No surprises here. The sectors that were particularly impacted by COVID are vulnerable right now, including leisure, travel, hospitality, tourism, energy, and brick-and-mortar retail. Those sectors that were already in distress pre-COVID, such as oil & gas and retail, may now be in extremis.

Was there any court decision, case or transaction this year that might set off a trend or may influence how restructurings are done in the future? Or, were there cases that took an unexpected or surprising turn last year? How?

Cyganowski: The Second Circuit's *Tribune II* decision (decided on the eve of 2020) will likely have a significant impact on how leveraged finance transactions and fraudulent conveyance litigation proceed in the future. See *In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98 (2d Cir. 2016), *as amended*, 946 F.3d 66 (2019) ("Tribune II"). In *Tribune II*, the Second Circuit found that the statutory safe harbor provision contained in Section 546(e) of the Bankruptcy Code protected the Tribune shareholder payments from a fraudulent transfer attack because a financial institution was acting as an agent for Tribune as its customer in connection with the transaction. In other words, a party structuring a transaction may be able to protect itself and the transaction from attack when a financial institution is used as an agent. To be sure, the matter remains unsettled outside the circuit and a petition for a writ of certiorari is pending before the Supreme Court.

Yenamandra: There were a number of interesting developments in the retail space post-COVID. First, there was suddenly a lot of spotlight on the bankruptcy provisions that provide a debtor-tenant relief from paying rent in the ordinary course for the first 60 days post filing. This provision hadn't been used that actively pre-COVID and over the last 9 months or so, several major retailers have sought relief under this provision. Second, there was a newfound focus on the value of unencumbered property. No one had ever had to reckon with how to value real property during a pandemic of unknown duration, or how to discount prior valuations. And, relatedly, there was certainly a flurry of activity on the valuation front itself, across many industries, as parties worked to evaluate whether the impact of COVID should be taken into account when assessing long-term value.

Carson: The Small Business Reorganization Act (SBRA) may offer a lifeline to regional and local businesses impacted by the COVID-19 pandemic, buying them time as they negotiate with lenders, landlords, and other creditors until resuming normal business operations. The caveat here is currently we don't know when that will be so there may also be an increase in the number of

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Subchapter V filings along with an uptick in Chapter 7 and 11 filings. Of the approximately 250 recently appointed Subchapter V Trustees, Stretto partners with a fifth of these fiduciaries to manage their steadily growing caseloads.

Bauer/Peña: Many would answer this question by citing the *In re: Modell Sporting Goods* decision. In such case, the Bankruptcy Court, District of New Jersey suspended the sporting good retailer's case, which afforded the retailer additional time to liquidate its assets. The court recognized that it was an unprecedented time as liquidation sales were halted due to COVID-19 closure orders as well as widespread social unrest following the May 25 death of George Floyd. After the pause on the *Modell's* bankruptcy case, *Modell's* successfully re-engaged the liquidation process with the sales achieving better than expected results.

By pressing "pause" in *Modell's* bankruptcy case, the debtors were not required to pay post-petition rent obligations in the short term and then negotiated a reduced amount relating to the time period that was subject to the closure orders. Other bankruptcy courts followed suit. See *In re: Pier 1 Imports*, Case No. 20-30805 (Bankr. E.D. Va. May 10, 2020); *In re: Brooks Brothers, Group, Inc.*, (Case No. 20-11785 July 8, 2020). Post-petition rent obligations have been excused or reduced in the restaurant industry as well. See *In re: Hitz Restaurant Group*, 2020 WL 2924523 (Bankr. D. Ill. June 2, 2020) where the Bankruptcy Court reduced the debtor's obligation to pay rent in proportion to its ability to generate revenue under an Illinois executive order, which suspended on premises consumption of food and beverages in restaurants.

The aforementioned cases show a willingness by bankruptcy courts to take into consideration the drastic impact the pandemic has had on debtors and will result in debtors requesting creative relief.

Dooley: Not really. [Bankruptcy] Courts are courts of equity and numerous decisions invoked common sense relative to contractual lease terms as I would have expected.

Wilen: While no decisions or cases come to mind, the closure of courtrooms due to COVID-19 has been a major factor this year. Closures have adversely affected the speed at which cases are administered—it has slowed the restructuring process, hindered our ability to get hearing dates, and eliminated some of the opportunity for sidebar negotiations in the hallways of the courthouse. Conversely, more mediation sessions have been held via Zoom rather than traveling to mediate in person. We have been involved in a number of mediations this year that have been highly effective and efficient—the related time and cost savings are significant.

Lisa Laukitis, Skadden: There were a few noteworthy decisions and transactions that may impact restructurings in 2021 and beyond. On October 22, 2020, the New York Court of Appeals in *CNH Diversified Opportunities Master Account, L.P. v. Cleveland Unlimited, Inc.*, 2020 WL 6163305 (NY Oct. 22, 2020) issued a decision that could provide minority noteholders with additional negotiating leverage in the context of attempted nonconsensual out-of-court restructurings. The court held that the strict foreclosure that occurred in the case improperly deprived minority noteholders of their legal right under the indenture to seek full payment of principal and interest on the notes (and to bring suit for such payment), absent their consent to modify such right. In so holding, the decision could result in an increase in in-court restructurings and prepackaged bankruptcy cases to effectuate transactions that previously may have been more efficiently accomplished in an out-of-court setting. The ultimate impact of the decision, however, may be tempered given that the type of strict foreclosure at issue in Cleveland is not the most common method of implementing restructuring transactions.

On October 26, 2020, the U.S. Bankruptcy Court for the Southern District of Texas issued a notable decision that could have significant economic repercussions on debtors and creditors alike. In *In re Ultra Petroleum Corp.*, No. 17-20793, 2020 WL 6276712 (Bankr. S.D. Tex. Oct. 26, 2020), the court held that (1) a make-whole premium constituted liquidated damages, not unmatured interest, and must be paid under the Bankruptcy Code and (2) the solvent-

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debtor exception continues to exist and requires the payment of post-petition interest at the contractual default rate. While the latter holding will be of limited import given the rarity of solvent-debtor cases, the court's conclusion that the make-whole premium was not interest could have more far reaching effects, especially with respect to whether the Southern District of Texas is an optimal choice of venue for a debtor that may owe a make-whole premium. Based on the reasoning in the decision, a debtor will unlikely be able to take refuge under Bankruptcy Code section 502(b)(2), which disallows claims for unmatured interest, to avoid paying a make-whole premium.

In what seemingly is becoming a trend in E&P Chapter 11 cases where a debtor seeks to reject burdensome midstream contracts under Section 365 of the Bankruptcy Code, the U.S. Bankruptcy Court for the Southern District of Texas, the leading forum in the country for oil and gas bankruptcies, held in *In re Chesapeake Energy Corporation*, No. 20-33233, 2020 WL 6325535 (Bankr. S.D. Tex. Oct. 28, 2020) that the debtor could reject a gas purchase agreement because the agreement did not create enforceable covenants that ran with the land. Interestingly, breaking from how courts and practitioners have traditionally understood midstream contracts in the context of bankruptcy, the court, in dicta, observed that it may be possible for a midstream contract to be both executory and contain covenants that run with the land. Such observations will likely impact how courts and litigants approach the ability-to-reject question in future Chapter 11 cases.

Early this year, Serta Simmons kicked off what soon became a developing trend in the lending community when it obtained $200 million of fresh capital from certain existing lenders while priming non-participating minority lenders. In short, a majority of Serta's first-lien lenders amended the credit agreement to permit the issuance of super-priority debt, which effectively subordinated the minority first-lien lenders. Since Serta, many other companies have sought to effectuate similar "creditor-on-creditor violence" transactions, such as Boardriders, Inc., and TriMark. Unsurprisingly, these financing transactions have resulted in litigation. And with the "covenant-lite" debt agreements that have become pervasive over the last few years due to, among other things, lenders chasing higher returns in an ultra-low interest rate environment, there are sure to be many other companies that seek to employ similar creative capital structure solutions to bridge the pandemic.

What presented as your greatest challenge in the past year?

Cyganowski: [Otterbourg] prides itself in a successful track record of withstanding challenges in the marketplace for over a century, and the Firm's performance in 2020 was a testament to its ability to adapt to external challenges while meeting our clients' needs. Our greatest challenge was adjusting from an office-based practice to a decentralized one. Practically speaking, that required an increased team-effort and technological innovation and cooperation. Preparing for meetings meant additional coordination. Lawyers needed to go that extra-mile as far as communication and responsiveness went—and they did. We focused on how our clients' needs shifted during this year and what we needed to do to fulfill their needs not just for this year, but for years into the future. We kept our summer associate program in place, albeit digitally, which was a challenge logistically, but was ultimately an important and successful effort in fortifying our bench and adjusting to new working environments. To be sure, we did not know how our practice would develop in this period. But in the end, our strong team pulled together to excel during a challenging time.

Ryan Blaine Bennett, Kirkland: The heart of any restructuring is the value of the go-forward company. That's what incentivizes existing creditors to take equity and incentivizes banks to provide loans. In the past year, in the face of an unprecedented pandemic, companies, creditors, and financing sources alike struggled with differing views on go-forward valuation. The extent to which the pandemic lasted also impacted valuation work, as the

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landscape kept shifting, and there was no real precedent to look to for guidance.

Likewise, in March, we had some companies that immediately went from being extremely profitable to zero revenue when corporate travel and entertainment halted. Unlike typical distressed clients who encounter a more gradual decline, these clients were completely blind-sided and required a lot more guidance on issues like proper corporate governance and creditor dynamics than the typical client who would have already been through multiple amendments and forbearances.

Kurtzman: Stretto's primary challenge was rapidly scaling our business in an unstable environment. Over the last several months we've on-boarded a large number of staff members and managed increasing caseloads while overcoming divergent challenges related to multiple service lines. With financial markets and industry regulations in flux, we've been able to effectively support the company's growth by expanding our shared service offerings to our broader client base.

Bauer/Peña: Adapting to the new normal. Prior to the pandemic, partners, associates and legal assistants worked from the office. Court hearings, mediations and networking events were all held in-person.

Working parents have been asked to play the role of attorney and teacher with homeschooling.

While we have learned that all of what we do can be done remotely, we all miss the personal contact and camaraderie of working in-person with a team or even adversaries. At times, we all experience Zoom fatigue.

Dooley: We brought on several new consultants in Q3 and Q4 expecting a surge in distressed consulting work and many banks proactively added workout officers. Since the surge never came, it's been hard keeping the new consultants busy so they could learn and develop restructuring skills quickly.

Wilen: Without being able to meet in person, my greatest challenges were keeping my team focused and together during the pandemic, and developing younger professionals virtually. As a young professional, I learned so much by simply observing senior professionals in court or meetings and all of that is difficult to do via a video conference or phone call. We had to get creative to keep people engaged and foster the next generation.

McGlynn/Orlofsky: Any of our challenges pale in comparison to those who have lost friends or family to this terrible disease. Our challenges are manageable. We think the greatest challenge this year was the constant uncertainty in so many aspects of our lives. Many things that we never think about became a major concern, such as should we visit family for holidays, should kids go to school in person, will the stores in my town survive, etc. The stress and anxiety this caused was palpable.

Not surprisingly, this uncertainty created a lot of work for the restructuring industry. Restructuring professionals live with uncertainty in many [of] our engagements so work almost felt easy compared to the everything else that was happening.

The lack of social interaction was also a challenge. So much of the restructuring community is based on personal relationships, much of which is developed through in person working and social events. While the restructuring community had a great year, it was not as much fun as normal.

Laukitis: Adjusting to the uncertainty and ever-changing circumstances. The start of the pandemic found most of us with an onslaught of clients in crisis while we adjusted to working from home (requiring some quick home office upgrades), managing family life with little or no help and, for some of us, home-schooling our kids. The spring seemed largely about keeping one's head above water. Once the summer arrived and things were more stabilized, it became important to find new ways to keep in touch with colleagues and clients, all of whom are equally strapped for time. Now, the challenge seems to be braving the months ahead, as this has gone on so much longer than anyone expected and we still have quite a ways to go. ¤