

West Virginia Bankruptcy and Consumer Law Seminar

West Virginia State Bar

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COVID-19 Impacts on Chapter 11

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I. **Case numbers**

1. **Nationally**

Calendar year 2021 - 413,616 total all chapters (288,327 Cpt. 7; 4,836 Cpt. 11; 120,002 Cpt. 13)

https://www.uscourts.gov/sites/default/files/data_tables/bf_f5a_1231.2021.pdf

Calendar year 2019 – 774,940 total all chapters (480,206 Cpt. 7; 7,020 Cpt. 11; 286,979 Cpt. 13)

https://www.uscourts.gov/sites/default/files/bf_f5a_1231.2019.pdf

Calendar year 2008 – 1,117,771 total all chapters (744,424 Cpt. 7; 10,160 Cpt. 11; 362,762 Cpt. 13)

https://www.uscourts.gov/sites/default/files/statistics_import_dir/F02Dec08.pdf

2. **WVSB/WVNB**

A. Calendar year 2021 filings

i. 699 in WVNB (589 Cpt. 7; 3 Cpt. 11; 107 Cpt. 13)

ii. 976 in WVSB (888 Cpt. 7; 8 Cpt. 11; 80 Cpt. 13)

B. Calendar year 2019 filings:

i. 1,101 WVNB (922 Cpt. 7; 6 Cpt. 11; 173 Cpt. 13)

ii. 1,737 WVSB (1508 Cpt. 7; 36 Cpt. 11; 192 Cpt. 13)

C. Calendar year 2008 filings:

i. 2,175 WVNB (1940 Cpt. 7; 17 Cpt. 11; 217 Cpt. 13)

ii. 3,144 WVSB (2,821 Cpt. 7; 23 Cpt. 11; 300 Cpt. 13)

II. CARES Act (Coronavirus Aid, Relief, and Economic Security Act)

- Increased the Subchapter V Small Business eligibility maximum debt limit from \$2,725,625 to \$7.5 million
 - Lapsed March 27, 2022 (extended from previous lapse of March 27, 2021 by COVID-19 Bankruptcy Relief Extension Act of 2021) (making debt limit again \$2,725,625)
 - but this lasted for 4 days as limit increased to \$3,024,725 on April 1, 2022 per regulation
 - Pending legislation to make increase to \$7.5 million permanent

III. Consolidated Appropriations Act of 2021 – supplement CARES Act

1. Certain provisions lapsed already

- A. Stimulus payments not estate property - 541(b)(11) - recovery rebates made under section 6428 of the Internal Revenue Code of 1986 are not property of the estate.
- B. Other chapters, extension of chapter 13 plan payment, supplemental claims for forbearance plans

2. Other provisions lapse on December 27, 2022

- A. Repayment obligation on non-residential lease (Subchapter V case only) - Section 365(d)(3) extension to max 120 days (increase from max 60 days)
- B. Assume or Reject non-residential lease – increased to 210 days to assume or reject (additional 90 days for cause) – 365(d)(4) – (increase from 120 days plus 90 for cause).
- C. Additional preference defenses for “covered payment of rental arrearages” or to the supplier for “covered payment of supplier arrearages” (Section 547(j)).

IV. Chapter 11 Process and Procedures

The COVID-19 pandemic has been an economic shock, the consequences of which have been and will continue to be severe for many businesses. Many businesses have already failed or undergone major changes to their business structures and business operations in an effort to survive. These changes have included obtaining new financing, restructuring existing debt, downsizing business operations and chapter 11 reorganization. The overwhelming expectation was that bankruptcy filings would increase by more than 100% starting in 2020.¹ Many bankruptcy courts developed processes and procedures to deal with the expected onslaught of new chapter 11 cases.

1. **General Background.** Chapter 11 of the Bankruptcy Code is designed to allow a business facing a crisis to maximize value, preserve jobs and operations while weathering the crisis.

A. In all chapter 11 bankruptcy cases, the chapter 11 bankruptcy petition is filed with the bankruptcy court and on the same day the debtor-in-possession files motions to be heard at the beginning of the case (the “First Day Motions”) addressing debtor-in-possession needs to continue in operation, including financing for the debtor-in-possession’s operations, use of its existing inventory and cash, and payment of pre-bankruptcy wages to its employees.

B. Once the chapter 11 bankruptcy case is under way, the debtors-in-possession frequently take one of three routes through the chapter 11 process: (i) file bankruptcy along with a prepackaged plan for the chapter 11 debtor’s emergence from bankruptcy; (ii) schedule a section 363 sale of all assets and either (a) convert the chapter 11 case to a liquidation case under chapter 7 of the Bankruptcy Code, or (b) confirm a plan in the chapter 11 case pursuant to which all remaining assets of the debtor-in-possession are transferred to a liquidating trust and its liquidating trustee who then proceeds to liquidate all remaining assets; or (iii) confirm a chapter plan of reorganization of its business operations.

2. **COVID-19 fears and expectations.**

- A. Vulnerability of small businesses to economic downturn
- B. Massive wave of bankruptcy filings predicted
- B. Over-crowding of the bankruptcy court system
- C. Availability of debtor-in-possession financing to reorganize a business

¹ Sizing Up Corporate Restructuring In the COVID Crisis, National Bureau of Economic Research, November 2020 (Robin Greenwood, Benjamin Iverson and David Thesmar)

3. **Bankruptcy courts establish COVID-19 procedures.**

- A. Bankruptcy courts cancel in-person hearings and trials
- B. Bankruptcy courts utilize video and audio products to keep the bankruptcy process moving
- C. Bankruptcy clerk's offices continue operations based on years of experience with electronic filings

4. **Bankruptcy filings.**

- A. Most law firms were (and continue to be) prepared for a virtual bankruptcy practice
- B. Debtors-in-possession, creditors and other interested parties in the chapter 11 process adapt to virtual hearings and proceedings
- C. Debtors-in-possession and other parties to the bankruptcy practice enjoy expanded opportunities to participate in bankruptcy cases due to virtual practice
- D. Debtors-in-possession and other parties to chapter 11 cases realize cost savings through virtual hearings and trials
- E. Several large businesses file bankruptcy due to COVID-19 pressures, including Washington Prime Group (filing date – June 13, 2021), Paper Source (filing date – March 2, 2021), Cici's (filing date – January 25, 2021), Christopher & Banks (filing date- January 14, 2021), FHC Holdings (parent of Francesca's) (filing date – December 3, 2020), Century 21 (filing date – September 10, 2020), Stein Mart (filing date – August 12, 2020), Tailored Brands (owner of Men's Warehouse and Jos A. Banks) (filing date – July 23, 2020) and Brooks Brothers (filing date – July 8, 2020), Stage Stores (owner of Peebles, Gordmans) (filing date – May 10, 2020). The list of companies continues including several more retailers, oil and gas related companies, and entertainment companies.
- F. Contrary to expectations, massive waive of bankruptcy case filings doesn't materialize as PPP loans provide cheap capital to struggling businesses and supply chains tighten

5. **New chapter 11 issues and benefits brought about by COVID-19.**
- A. Feasibility of any chapter 11 reorganization plan during a pandemic
 - B. Shrinking access to debtor-in-possession financing and use of cash collateral
 - C. Subchapter V of chapter 11 modifications expand availability of its provisions to cover more small businesses (discussed above)
 - (i) Increased debt limits
 - (ii) Additional time to assume or reject certain leases if debtor has experienced hardship due to COVID-19
 - (iii) Limitations on preferential claim clawback
 - (iv) Sunsetting provisions
 - D. Increased scrutiny of chapter 11 bankruptcy process, including benefit to insiders, availability and terms of restructuring of large businesses, venue, third party releases and lender control of bankruptcy outcomes
 - E. In 2017, 71% of bankruptcy attorneys would like much of the remote practice continued after social distancing and mask mandates are removed
 - F. Foreign businesses utilize United States bankruptcy system to restructure
 - G. Anticipated lease terminations due to remote work

SOURCES

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Bloomberg Law, Bankruptcy Practical Guidance & Analysis, Jacquelyn Palmer and Teadra Pugh, July 26, 2021

International Companies Turn to US Restructurings for COVID-19 Relief, Shana A. Elberg, Lisa Laukitis, June 28, 2021