# Market Intelligence

# R&I 2021

Global interview panel led by Paul, Weiss, Rifkind, Wharton & Garrison LLP

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# R&I
# 2021

# United States

A partner in the restructuring department at Paul, Weiss, Rifkind, Wharton & Garrison LLP, Jacob Adlerstein has broad experience advising a variety of clients in bankruptcy cases and corporate restructurings, including debtors, official and ad hoc creditor committees and distressed investment funds. Jake's company-side representations include Hexion, Cumulus Media, Pinnacle Agriculture Holdings and AbitibiBowater, and recent creditor and private equity sponsor representations include Guitar Center, Ligado Networks, J Crew, Associated Materials, GNC Holdings, PDVSA, EP Energy, American Tire Distributors, Bellatrix Exploration, Energy Future Holdings, Pacific Exploration, Dynegy and Aspect Software.

Jake has been recognised by *The Legal 500* and he was named in Lawdragon's inaugural list of "500 Leading US Bankruptcy & Restructuring Lawyers". In 2016, Jake's work in Aspect Software's Chapter 11 case was recognised by The M&A Advisor in its annual Turnaround Awards as their "Information Technology Deal of the Year (Over $250MM)". He regularly participates on panels sponsored by industry organisations, including Practising Law Institute.

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1 | In the past year, have you seen any developments or trends in the nature and volume of insolvency filings? (For example, are certain industry segments experiencing a rise in distressed situations?)

The covid-19 pandemic has had – and continues to have – a dramatic impact on large swathes of the global economy and has precipitated a marked increase in restructuring activity in the United States. Many industries have suffered significant declines in revenue, often as a result of government-imposed shutdowns and related social distancing measures. There have also been disruptions to the supply chain, as countries have limited the flow of goods and services to combat the pandemic. These unprecedented events have both accelerated the downward trajectory of certain distressed companies and exposed previously healthy companies to financial distress.

Prior to the pandemic, there had already been significant restructuring activity in the retail industry, largely as a result of the disruption caused by online retailers. The pandemic-related market dislocation has greatly accelerated this dynamic. In the past few months, several nationally recognised retailers with significant physical footprints filed for Chapter 11 protection, including J Crew, Neiman Marcus, JCPenney, Brooks Brothers and Lord & Taylor, to name a few. Many of these retailers filed for Chapter 11 with dwindling liquidity and the need to quickly consummate prepacks or going-concern sales to preserve their businesses.

The oil and gas industry is another sector that has experienced this acceleration trend. While oil and gas companies have experienced several periods of distress over the past five years, the pandemic and its resulting impact on consumer demand, combined with the supply-side disruption caused by the breakdown of commercial relations between the Organization of the Petroleum Exporting Countries (known as OPEC) and other oil producers this past spring, resulted in an unprecedented commodity price free fall, with spot oil prices temporarily dropping below zero. The consequences of these depressed commodity prices were felt not only by upstream companies – firms engaged in the identification, extraction or production of raw materials – but also by many other industry participants, including midstream and downstream providers, as well as oilfield servicers. Notable filings in this industry included Ultra Petroleum, Extraction Oil & Gas, Chesapeake Energy, Whiting Petroleum, Fieldwood Energy, Chaparral Energy, Diamond Offshore Drilling, Hornbeck Offshore Services and FTS International.

The pandemic has also exposed previously healthy companies to new-found financial distress, most notably in the transportation, leisure and dining segments. Many of these companies saw their revenue decline to nearly zero overnight. Some of the larger businesses – including certain of the global airlines, cruise lines and hotel


Jacob Adlerstein

chains – were able to access the capital markets at the beginning of the pandemic and thereby sufficiently shore up their liquidity to withstand the shock. Others, such as Hertz car rental, Town Sports (owner of a national chain of sports clubs) and CEC Entertainment (owner and operator of Chuck E Cheese), were forced to file for Chapter 11 protection. The extent of any additional restructuring activity in this sector remains to be seen and will largely depend on how quickly the economy can rebound following distribution of a vaccine and the ability of these companies to repay the significant indebtedness they incurred to sustain operations during the pandemic.

## 2 Describe the one or two most notable insolvency filings in your jurisdiction in the past year.

One of the most notable bankruptcy filings this past year was Neiman Marcus, a large national retailer with billions of dollars of debt and global physical and online operations. The Neiman restructuring was largely caused, or at least meaningfully accelerated by, the pandemic. However, notwithstanding the exigent circumstances that caused the company's filing – or perhaps because of them – the company was

able to achieve a remarkable level of consensus in a compressed period, including the resolution of significant alleged inter-company claims that at one point threatened to derail the restructuring. The final result was a successful Chapter 11 plan that meaningfully deleveraged the company's balance sheet, enhanced liquidity and allowed a national retailer to emerge from bankruptcy as a viable going concern during the height of the pandemic. Unfortunately, the case was also notable for serious allegations of misconduct that occurred at the conclusion of the proceedings, casting a shadow on some of the matter's otherwise significant achievements and providing an important reminder of the need for estate representatives and professionals to be vigilant in discharging their fiduciary obligations and the serious consequences that can follow from a failure to do so.

### 3 Have there been any recent legislative reforms? Is there a perceived need for reform?

In March, the Coronavirus Aid, Relief and Economic Security Act (the CARES Act) was enacted into law, providing more than US$2 trillion of economic relief for individuals and businesses dealing with the consequences of the covid-19 pandemic. In addition to providing fiscal stimulus to the broader economy, the CARES Act included several temporary amendments to the Bankruptcy Code aimed at providing small businesses and individuals in financial distress with increased access to streamlined bankruptcy relief. Specifically, the CARES Act expanded the eligibility for businesses to take advantage of the small business reorganisation provisions of the Bankruptcy Code by raising the debt limit criteria from US$2.7 million to US$7.5 million.

Additionally, the CARES Act amended Chapters 7 and 13 of the Bankruptcy Code, among other things, to exclude from income the receipt of coronavirus-related relief payments and permit modification to pending Chapter 13 reorganisation plans of individuals with regular income. Unlike most prior amendments to the Bankruptcy Code, however, the CARES Act modifications are temporary and will expire in March 2021 in the absence of further congressional extension.

### 4 In the international insolvency field, have there been any legislative or case law developments in terms of coordination of cross-border cases? What jurisdictions are you most likely to have contact with?

While the last year has not generated any significant legislative or case law developments addressing the coordination of cross-border cases, foreign companies continue to avail themselves of the benefits and protections available under the US Bankruptcy Code, both in connection with plenary and ancillary proceedings.

"LATAM attributed its filing to the pandemic-related dislocation, noting a 95% reduction in passenger service."

For example, LATAM Airlines, one of Latin America's leading airline groups and the 14th-largest airline group in the world (measured by passengers carried), filed for Chapter 11 protection in the Southern District of New York in May. Similarly to other foreign carriers that filed this past year, such as Avianca and Aeromexico, LATAM attributed its filing to the pandemic-related dislocation, noting a 95% reduction in passenger service. Other significant foreign filings included the Chapter 15 filings by Cirque du Soleil, Virgin Australia and Swissport Fueling. While US courts have significant experience coordinating cross-border cases with a number of foreign jurisdictions, Canada and the United Kingdom are probably the two jurisdictions that US courts most frequently engage with.

**5 In your country, is there a particular court or jurisdiction that sees a higher concentration of insolvency filings? What is the attraction of that forum?**

While there are bankruptcy courts in every federal judicial district in the United States, a small subset of these jurisdictions attract a significant portion of the large

corporate restructuring cases. Historically, the Southern District of New York and the District of Delaware have been the two leading venues for large corporate reorganisations. Though these two jurisdictions continue to attract a significant share of corporate Chapter 11 filings, other jurisdictions have recently experienced a marked increase in filings, including the Southern District of Texas and the Eastern District of Virginia. While many factors are considered in assessing where a company should file for Chapter 11 protection, one of the most critical is the experience of the bankruptcy judges (and other bankruptcy participants) in a given district and specifically their experience overseeing similar types of large corporate restructuring cases. This experience can help a company and its advisors more accurately predict potential case outcomes and thereby develop a strategy for a successful restructuring.

### 6 | Is it fair to describe your jurisdiction as either "debtor-friendly" or "creditor-friendly" in terms of how insolvency filings proceed?

In my view, the US Bankruptcy Code is neither expressly debtor-friendly nor creditor-friendly, but rather "going-concern friendly". That is, it is built on the fundamental

Photo by Tania Fernandez on Unsplash

notion that a company and its stakeholders – including creditors, equity holders, suppliers, vendors and employees – are typically best served by preserving financially distressed businesses as going concerns. When a distressed company is able to reorganise and emerge as a going concern, jobs can often be saved and recoveries for the company's financial stakeholders can be maximised.

There are a number of features of the Bankruptcy Code that facilitate going-concern reorganisations, including the following.

Automatic stay – this halts all creditor collection efforts to provide a debtor with breathing space to obtain the requisite support for a reorganisation. It centralises most disputes with the debtor into one forum for the efficient and fair management of a debtor's liabilities.

Financing – Section 364 of the Bankruptcy Code facilitates a debtor's ability to obtain financing while in bankruptcy (including on a super-senior basis), which is often necessary to allow operations to continue in the ordinary course.

Exclusivity – unless otherwise ordered by the Bankruptcy Court, the Bankruptcy Code provides that the debtor has the exclusive right to propose a Chapter 11 plan for the first 120 days of the case and this exclusivity period can be extended for up to 18 months.

Executory contracts and unexpired leases – the Bankruptcy Code allows a debtor to reject many types of burdensome contracts and leases. This is a powerful tool that can facilitate a debtor's operational restructuring.

Binding dissenting creditors – the class voting provisions of the Bankruptcy Code provide for specified super majorities to bind non-consenting members of the class and, subject to satisfaction of the Code's cramdown standards, binding a non-consenting class to a Chapter 11 plan.

## 7 What opportunities exist for businesses wanting to purchase assets out of an insolvency, and how efficient is the process? What are the best ways to take advantage of opportunities in this area?

Companies frequently file for Chapter 11 protection to sell all or a portion of their assets as a going-concern business under Section 363 of the Bankruptcy Code. Section 363 sales allow a purchaser to acquire assets free and clear of certain liens, claims and encumbrances that would otherwise attach to such assets, which can be a very attractive feature for potential purchasers.

While not as common as asset sales under Section 363 of the Bankruptcy Code, asset sales may also take place under a Chapter 11 plan. One of the key differences between the two types of sales is timing. Unlike a Section 363 sale – which can often be done on relatively short notice and early in a Chapter 11 case – a sale under a

Chapter 11 plan requires the negotiation, solicitation, approval and consummation of the plan itself – typically a lengthy process. In addition, approval of a Chapter 11 plan generally requires the consent of many stakeholder constituencies, whereas a Section 363 sale does not require a creditor vote.

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# The Inside Track

**What two things should a client consider when choosing counsel for a complex insolvency filing in this jurisdiction?**

Many factors go into identifying the right counsel for a complex insolvency matter. Experience is critical and can take a number of forms, including industry-specific experience as well as prior work representing similarly situated clients. It is also worth considering the quality of a law firm's other practice areas, including in litigation, capital markets and tax. Complex restructuring matters often require counsel to leverage resources across a wide range of practice areas and a client should carefully consider a counsel's ability to harness a top-notch cross-disciplinary team that will protect the client's interests in all facets of the restructuring matter.

**What are the most important factors for a client to consider and address to successfully implement a complex insolvency filing in your jurisdiction?**

While there are many pathways to a successful restructuring transaction, the ability to quickly develop broad stakeholder consensus is among the most important factors. Stakeholder consensus mitigates the risk that a restructuring will become mired in costly and time-consuming litigation and opens up the opportunity to take advantage of streamlined procedures (such as a pre-packaged filing) that expedite the case timeline, thereby reducing cost and uncertainty. Another key factor is liquidity. The more liquidity a company has, the more time, optionality and leverage it typically retains in restructuring negotiations, which it can ultimately utilise to generate stakeholder consensus.

**What was the most noteworthy filing that you have worked on recently?**

Guitar Center was one of the most noteworthy and rewarding filings I worked on this past year. Like dozens of other bricks-and-mortar retailers, Guitar Center was unable to withstand the havoc caused by the pandemic. However, Guitar Center's case was unique as its business remained fundamentally sound, which allowed it to attract significant new capital in connection with its restructuring. The company was also able to achieve consensus among its bondholders. The result was a successful 30-day bankruptcy that significantly deleveraged the company and allowed general unsecured creditors to be repaid in full – a rare event in retail cases.

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