The New Normal:

IMPACT OF THE GLOBAL PANDEMIC ON U.S. RESTRUCTURINGS

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The U.S. experienced the lowest total number of bankruptcy filings since 1986 last year, including individuals filing for bankruptcy, a somewhat surprising statistic given the devastating impact of the pandemic-driven shutdowns across the United States and around the world.

Bucking that trend, Chapter 11 filings, which most U.S. businesses use to effect in-court restructurings, rose 29% in 2020, with 7,128 new filings, compared to 5,518 in 2019, according to data collected by Epiq. While a spike in Chapter 11 filings was seen in the second and third quarters of 2020 as the effects of COVID-19 meaningfully impacted corporate liquidity, this trend has abated as the U.S. Congress and Federal Reserve stepped in to support the U.S. economy. Chapter 11 filings in 2021 have dropped to historic lows on the back of U.S. institutional leveraged loan and high-yield default rates hitting 10-year lows. Fitch Ratings now has its 2021 forecast for leveraged loan defaults at 1.5% and 1% for high-yield defaults.

Many countries worldwide reacted to the onset of the global pandemic with significant changes to insolvency legislation and moratoriums on enforcement or other insolvency steps. By contrast, changes in U.S. federal insolvency legislation outside of the small business context were limited. This may have been due in part to the U.S. political climate at the time and in part to the focus of the Federal Reserve on using monetary policy to address the impact of COVID-19 on the U.S. economy.

During the course of 2020, restructuring advisors spent significant amounts of time incorporating the Fed's Main Street Lending Program (MSLP), announced on April 9, 2020, into their restructuring toolkit for clients. That program, intended to support businesses too large for the Small Business Administration's Paycheck Protection Program (PPP) and too small for the Fed's corporate credit facilities, provided for the

Fed to fund up to $600 billion in five-year loans to U.S. corporations, provided annual revenue was below $5 billion and their employee base didn't exceed 15,000 employees.

Larger U.S. corporations with high credit ratings were beneficiaries of the Fed's Primary Market Corporate Credit Facility, which allowed the Fed to purchase bonds and make loans directly to these businesses, and the Secondary Market Corporate Credit Facility allowed the Fed to purchase existing corporate bonds, among other things, that these businesses had issued. The Fed ultimately issued $17.5 billion through 1,830 MSLP loans, and the net effect of this and the Fed's other programs is clear in the short term when considering the precipitous drop in annual Chapter 11 filings in 2021.

Probably the most meaningful amendment to the U.S. Bankruptcy Code, which was incorporated as a result of the global pandemic but has a two-year sunset provision, was the extension of time that businesses in Chapter 11 have to determine whether to assume or reject nonresidential leases of real property under Section 365(d)(4). Prior to COVID-19, a Chapter 11 debtor had a 120-day period following its bankruptcy filing to make that decision, a period that could be extended by up to 90 days for cause (and without the affected landlords' consent). This time period has now been expanded, giving debtors an initial 210 days to make this decision, with the additional 90 days extension for cause also being preserved.

At the same time as the U.S. was shutting down retail storefronts and closing its borders, a meaningful evolution in bankruptcy practice in U.S. Bankruptcy Courts started to develop. These courts underpin the U.S. federal bankruptcy system, and bankruptcy judges are often former restructuring lawyers. The flexibility shown by U.S. Bankruptcy Courts at the onset of the global pandemic was remarkable and

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contributed to ensuring that businesses in distress continued to have access to the U.S. restructuring regime. Without missing a beat at the onset of COVID-19, all Bankruptcy Court hearings rapidly shifted initially to become telephonic and shortly thereafter moved to Zoom or similar videoconferencing platforms.

Speedcast International's Chapter 11

Speedcast International is the largest provider of remote communications and IT services in the world and services customers in more than 140 countries. It became one of the first test subjects for this seismic shift in restructuring practice at the start of the global pandemic. The Sydney-headquartered company experienced the full effect of COVID-19 early in 2020 as two of its primary end-user markets—cruise/ferry and energy, including offshore oil & gas—comprising nearly 50% of its revenue, were effectively shut down.

Due to its global footprint, Speedcast was fortunate to have multiple restructuring regimes available to it globally to restructure approximately $700 million in funded debt. The company ultimately filed for bankruptcy protection in the United States after its lenders agreed to provide $185 million in bankruptcy financing, which was subsequently upsized to $285 million, conditioned on the restructuring being carried out in U.S. Chapter 11 proceedings.

Speedcast's cases were the first fully virtual Chapter 11 proceedings ever undertaken for a global business. Restructuring advisors were interviewed and engaged over Zoom or Microsoft Teams, and negotiations with lenders were all held virtually. After the company filed for Chapter 11, every hearing in the case occurred by videoconference, from the first day hearings to multiple contested hearings to an eight-day confirmation trial held from December 17, 2020, to January 21, 2021. The company was successfully recapitalized with a $500 million equity infusion from Centerbridge Partners and redomiciled in the United States. To this day, almost no one involved in this intense 12-month restructuring has met in person.

While the legal framework for Chapter 11 restructurings continued largely unchanged throughout the global pandemic, board members and restructuring advisors, including lawyers, financial advisors, and investment bankers, were required to adapt their day-to-day practices on the fly to ensure that restructurings could continue to operate efficiently.

The United States has a corps of specialist restructuring advisors who operate in a tightly knit industry. The existing relationships among advisors are an intangible but critical factor in ensuring the smooth and efficient administration of large corporate restructurings. These restructurings often move at the speed of trust, built up—or not, as the case may be—among the professionals involved over years or even decades of restructuring businesses together. Trust also must be rebuilt with a company's employees, suppliers, and vendors following a Chapter 11 filing; between a company in distress and its advisors; and between the company and its creditors over the course of the restructuring.

In a completely virtual world, building that trust inevitably takes more effort and time, if it can be achieved at all. Communication is a key part of building trust, and Speedcast's CRO, Michael Healy, a senior managing director at FTI Consulting, adopted a "chief communications officer" role to supplement his CRO position at Speedcast, emphasizing that "over-communication was the only way to communicate."

Building on that communication foundation, Speedcast took a "measure twice, cut once approach" to all of its business activities. Due to the lack of in-person meetings, time zone differences, and the fact that most communications were via email, every process that the company undertook as part of the restructuring had to be designed upfront rather than evolved organically. Clear roles and responsibilities were defined proactively to ensure that critical work-product was signed off on by the right executives within the defined time frames required by a Chapter 11 restructuring without losing time due to time zone differences and the impact of COVID-19.

Speedcast also saw extensive discovery and litigation, as two of its key lenders battled for control of the business in a highly publicized bidding war, using every tool in the playbook in an effort to gain advantage over the other. With Speedcast's board members and senior executives located in Australia and the United States, and key employees located around the globe, electronic communication was necessarily pervasive. The tendency for all parties to rely on email communication given time zone differences and the impossibility of travel resulted in significantly larger than usual volumes of data that had to be reviewed, analyzed, and produced in discovery, increasing the cost of the restructuring significantly for the business.

Another significant change that virtual hearings brought was bankruptcy judges' ability to fit hearings into their schedule as permitted rather than scheduling large blocks of time for a trial to which parties would travel to attend. Paul Genender, Weil's lead litigation partner on the case, noted that the segmenting of hearings into multiple parts made it more complicated for the company, and for its battling creditors, to maintain consistency in messaging to the court throughout the proceedings.

Some Changes to Remain

As the world starts to tame the COVID-19 pandemic, life is slowly returning to a semblance of normality in the United States. In-person Bankruptcy Court hearings are expected to recommence in September 2021, although some of the changes brought about by the global pandemic will remain in place. Certain Bankruptcy Courts have suggested that they are likely to allow so-called first day hearings, the emergency hearings sought by a company to obtain its initial relief in bankruptcy, to continue to be entirely virtual, given the speed at which they occur (generally 24 to 48 hours after filing) and the difficulty parties from around the world have in attending these hearings on short notice.

Bankruptcy Courts are also adopting protocols to allow parties to stipulate for hearings to be held entirely virtually (and to enforce that stipulation), which makes sense in the context of routine or administrative hearings and will reduce the cost of these hearings significantly.

Other changes in practice initiated during the global pandemic are likely to be eliminated. No matter how good the technology, most people, bankruptcy judges included, believe there is no substitute for in-person hearings for trials and other contested matters. The global pandemic unquestionably accelerated the adoption of videoconferencing technology for U.S. federal courts and law firms and other advisors involved in U.S. restructurings, but much of the pre-pandemic practice will likely return. Old habits die hard, and it turns out that this may be for good reason.

David Griffiths represents Speedcast.

David Griffiths is a partner at Weil, Gotshal & Manges LLP in the Restructuring Department in New York. He regularly represents large and medium-size businesses in strategic planning, restructuring, and Chapter 11 proceedings. He has significant experience representing hedge funds in all areas of domestic and international restructurings and distressed asset purchases, as well as in crisis management, corporate governance, financings, and corporate and capital markets transactions. Griffiths regularly works on pro bono matters and is heavily engaged in charitable activities.