

Friday, November 5, 2021
9:00 AM to 10:15 AM

General Session 6

“Seeking Normalcy in Retail – Shopping Centers and Bankruptcy on a Swiftly Tilting Planet”¹

Presented to

2021 U.S. Law Conference
San Francisco Marriott Marquis
San Francisco, CA
November 3-5, 2021

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Introduction

“Normal” was a steady flow of retail bankruptcy filings. For decades before the global COVID-19 pandemic threw the economy into turmoil, the retail landscape in the United States presented traditional retail, as well as the entertainment, fitness, real estate, and food/beverage sectors, with significant secular and financial challenges. While shopping centers continued evolving, faced with shifting consumer demographics and e-commerce competition across the industry, retailers struggling to avoid becoming obsolete victims of the ongoing “retail apocalypse”² frequently resorted to the chapter 11 bankruptcy process to reorganize capital structures and operations, transfer ownership or liquidate assets.

Add nationwide civil unrest following the death of George Floyd and a tumultuous election to the devastating impact of a global pandemic, 2020 was an extremely challenging year for everyone. As expected, numerous retailers large and small sought relief under chapter 11 of the Bankruptcy Code.³ The global pandemic not only drastically increased the number of overall bankruptcy filings and store closures throughout the country, but also accelerated ongoing trends and forced brick-and-mortar retailers, landlords, and courts to confront novel issues arising from the temporary cessation of almost all mall-based economic activity, including complete case suspensions, across the board rent deferrals and portfolio wide *force majeure* litigation.

However, as these issues are being finalized in the middle of 2021, the US economy is emerging from a brutal 15 months of pandemic induced lock down and economic distress. Buoyed by massive Federal stimulus programs, low interest rates, rising wages and climbing commodity prices spark fears of inflation. Meanwhile, in the restructuring world, an eerie calm descends as retail chapter 11 filings dropped to their lowest pace in the memory of even the most seasoned practitioners.⁴

We begin with a brief overview of the history of shopping centers, discuss how the challenges and impact of COVID-19 on the retail sector played out in bankruptcy proceedings, and finally address what the future may have in store for shopping centers and retail restructuring going forward.

¹ Inspired by *A Swiftly Tilting Planet*, Madeleine L'Engle, third book in the Time Quintet, Farrar, Strauss and Giroux 1978. The authors would like to thank their colleagues, Connie Choe, Amanda Lindner, Summer McKee, and especially Jennifer Raviele for their significant contributions to these materials.

² See Paige Darrah, *How These Niche Stores Are Surviving The Retail Apocalypse* (Nov. 15, 2019), <https://www.nytimes.com/2019/11/15/nyregion/analog-era-shops-nyc.html?searchResultPosition=15>.

³ 11 U.S.C. §§ 101, *et seq.*

⁴ This was a unanimous response to the author's informal survey of multiple veteran restructuring professionals.

I. History Of Shopping Centers

With mall owning landlords PREIT,⁵ CBL⁶ and Washington Prime⁷ all recently filing for chapter 11 bankruptcy protection, a walk down memory lane to remember (or learn) how shopping centers developed in the United States is instructive. Understanding the history of department stores and shopping centers helps us to see why changes in the shopping centers themselves and the demise of department stores was predictable and why the changes we are seeing today in the retail landscape amplify the intersectionality of the development of shopping centers and the rise of chapter 11 bankruptcies of certain shopping center owners and department store chains.

The world's oldest department store, Bennet's of Irongate, opened its doors in Derby, England in 1734. This department store was an outgrowth of the general stores that were common in cities and hamlets throughout England. Bennet's of Irongate developed into the first large-format retailer with square footage available to provide an extensive assortment and variety of goods for consumers to choose from, organized by categories into separate departments. In 2019, after 275 years, Bennet's closed its doors and is now an e-commerce only business.⁸

The first department stores in the United States were Lord & Taylor, founded in 1854 by Samuel Lord and George Washington Taylor,⁹ and Macy's, founded in 1858 by Rowland Hussey Macy¹⁰.

At the same time, Sears, Roebuck & Co. and Montgomery Ward & Co., developed substantial catalog business and started to reach consumers in a different way. In 1872, Aaron Montgomery Ward established the first mail order business with 163 items¹¹ and Richard Sears and Alvan C. Roebuck started selling watches and jewelry only by catalog in 1888.¹² Both of these catalog companies became behemoth department store chains in the 20th century.

The first shopping mall, Country Club Plaza, opened in 1922 near Kansas City, and was technically an outdoor shopping plaza, founded by J.C. Nichols Company. Country Club Plaza is still operating today.¹³ However, the first indoor shopping mall, Southdale in Edina, Minnesota (near Minneapolis), did not open until 1956. It was a two-level design, with air-conditioning, heating, and a comfortable common area anchored by two competitive department stores.¹⁴ By the mid-1900's, most major cities and many smaller ones in the United States had department stores and were no longer dependent on mom and pop retail. In the 1950's and 1960's, as highways were built and families were drawn to inexpensive suburban housing,¹⁵ populations migrated from cities to the suburbs throughout the United States. By 1964, there were 7,600 shopping centers in the United States, many of which were strip malls serving new housing developments.¹⁶ The regional mall format eventually became the predominant form of shopping centers developed in the second half of the 20th century. The full-line department stores that anchored regional malls largely attracted consumers and provided them with a range of goods and products that could only be found under one roof in those department stores. The massive population shift and change in shopping habits diminished downtown shopping districts. The regional mall format dominated shopping center development for over 30 years before reaching maturity (3,000 regional malls) in the mid-1980's. The growth of the suburbs set the stage for real estate developers to build regional malls that were anchored by the rapidly expanding regional and national department stores.

⁵ *In re Pennsylvania Real Estate Investment Trust*, No. 20-12737 (KBO) (Bankr. D. Del. Nov. 2020).

⁶ *In re CBL & Associates Properties, Inc.*, No. 20-35226 (DRJ) (Bankr. S.D. Tex. 2020).

⁷ *In re Washington Prime Group Inc., et al.*, No. 21-31948 (MI) (Bankr. S.D. Tex. 2021).

⁸ See Bennetts (Est. 1734), <https://www.bennetsofderby.co.uk/>.

⁹ See Stacy Goaddard, *History of New York's Lord & Taylor Department Store* (February 2021), <https://classicnewyorkhistory.com/history-of-new-yorks-lord-taylor-department-store/>.

¹⁰ See Virginia Repka-Franco, *A Fascinating History of Macy's Department Store in Herald Square* (2017), <https://classicnewyorkhistory.com/macys-department-store-history-and-info/>.

¹¹ See Montgomery Ward, <https://www.wards.com/cm/history-about-us.html>.

¹² See History.Com Editors, *Sears* (March 13, 2019), <https://www.history.com/topics/early-20th-century-us/history-of-sears>.

¹³ See YourArticleLibrary, *History of Malls*, <https://www.yourarticlelibrary.com/mall-management/history-of-malls-management/87292>.

¹⁴ See Susan Meyer, *The History and Evolution of Retail Stores: From Mom and Pop to Online Shops* (2020), <https://www.bigcommerce.com/blog/retail>.

¹⁵ See Newsday, *Levittown History in Photos*, <https://www.newsday.com/long-island/levittown-history-in-photos-1.13458781>.

¹⁶ See Meyer, *supra* note 14.

Big Box retailers threatened department stores and regional malls.¹⁷ Large-format retailers in new power centers chipped away at goods previously sold primarily in department stores, like toys, appliances, electronics, office supplies, furniture, and sporting goods. Add the advent of discount retailers like Walmart and popular-priced retailers like Target and TJMaxx and the hold that department stores had on consumers continued to crumble.

Pundits have been predicting the death of department stores for years, but when the COVID-19 pandemic hit, the New York Times observed what we all knew—that very few were likely to survive.¹⁸ Over 25,000 stores were predicted to close in 2020.¹⁹

II. Impact Of Pandemic On Shopping Centers

Existing in a dynamic and volatile industry, retailers have been a mainstay of the chapter 11 bankruptcy process since the introduction of the modern Bankruptcy Code in 1978.²⁰ Since its original passage in 1978, several congressional amendments to the Bankruptcy Code in 1984, 1994 and 2005 significantly bolstered landlord rights by requiring performance of post-bankruptcy filing obligations such as payment rent by bankrupt tenants, reducing the amount of time debtors have to assume or reject leases, and requiring enforceability of provisions in leases and related contracts protecting the shopping center and developing as one economic unit in connection with lease assignments.²¹ In recent years, the rise of power centers, demise of department store anchored malls, changing shopping patterns, shifting demographics, and the advance of e-commerce giants like Amazon lead to increased need to right size brick-and-mortar store portfolios, and a steady increase in retail bankruptcy filings.²²

The government restrictions imposed on non-essential businesses at the outset of the COVID-19 pandemic greatly accelerated the pace of bankruptcy filings in 2020, hastening the changes already underway in the retail sector.

a. **Amplification of Changes Underway Before The COVID-19 Pandemic**

Retail companies filing for Bankruptcy in the years prior to COVID shared very similar profiles with companies filing during the pandemic. 9 of the 10 largest chapter 11 filings in 2020 were already on pre-COVID watch lists. Much of the surge was attributed to the impact of burgeoning e-commerce on brick and mortar stores and shopping malls led as more and more consumers embrace the convenience of online shopping for products and services, leading to a decline in foot traffic and a spike in store closures.

i. *Over-Expansion*

The problems caused by over-expansion, a recurring theme for retailers filing for bankruptcy, were highlighted by the pandemic. Seeking to grow their business and acquire bigger market share, retailers struggled to maintain profits and manage growing logistical challenges. In 2018, the United States reported having the highest retail space per capita in the world at 23.5 square feet per person.²³ Following the 2008 financial crisis and the ensuing recession, companies found themselves ill-equipped to meet the increased demands of supply chain management, staffing, and financing that came with the expanded store counts.

In 2020, there were more than 12,000 permanent store closures, surpassing the approximately 9,000 stores that closed in 2019.²⁴

¹⁷ See Rajiv Lal and Jose B. Alvarez, *Retailing Revolution: Category Killers on the Brink* (Oct. 10, 2011), <https://hbswk.hbs.edu/item/%20retailing-revolution-category-killers-on-the-brink>.

¹⁸ See Sapna Maheshwari and Vanessa Friedman, *The Death of the Department Store: 'Very Few are Likely to Survive'*, <https://www.nytimes.com/2020/04/21/business/coronavirus-department-stores-neiman-marcus.html>.

¹⁹ See Sam Wetherell, *The COVID-19 Pandemic Has Been Tough on Shopping Malls. History Suggest We Should Be Wary Of What Might Replace Them*" (Oct. 28, 2020), <https://time.com/5904882/shopping-mall-history/>; see also *Deadmalls* (2021), <http://deadmalls.com/>.

²⁰ See The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, codified at 11 U.S.C. §§ 101-1330 (1988).

²¹ See Christopher A. Camardello, *Landlords, Tenants, and the New Bankruptcy Amendments*, 62 *Bench & Minn.* 20 (2005) (discussing bankruptcy amendments and its provisions impact on landlords).

²² See Pamela N. Danziger, *9 Demographic Trends Shaping Retail's Future* (Sept. 6, 2018), <https://www.forbes.com/sites/pamdanziger/2018/09/06/9-demographic-trends-shaping-retails-future/> (demographic trends); see also Michael Ellis, *The Evolution Of The Internet And Its Impact on Retail Spaces* (July 2014), <https://www.wired.com/insights/2014/07/evolution-internet-impact-retail-spaces/> (e-commerce impact).

²³ See Statista Research Department, *Retail Space Per Capita in Selected Countries Worldwide In 2018* (Nov. 6, 2020), <https://www.statista.com/statistics/1058852/retail-space-per-capita-selected-countries-worldwide/>.

²⁴ See Phil Wahba, *A Record 12,200 U.S. Stores Closed in 2020 as E-Commerce, Pandemic Changed Retail Forever* (Jan. 7, 2021), <https://fortune.com/2021/01/07/record-store-closings-bankruptcy-2020/>.

ii. *Changing Tastes*

Shifting demographic trends and changing customer preferences also contributed to steady migration to online shopping and store closures within the retail industry. Shopping at malls, once a common social activity, was redefined by modern consumer preferences, online retailing and convenient personal shopping options, including buy-online-pick-up-in-store, curbside pickup, and delivery services. With millennials entering the workforce, there has been an increased tendency to forego visiting brick-and-mortar stores and instead spend online for essential and nonessential items. Generation X eventually experienced a similar shift as increased social media engagement lead to a pattern of online shopping, particularly for apparel and footwear, at-home entertainment, and food takeout/delivery.²⁵

The behemoth online outlet Amazon and retail stalwart Walmart, were well positioned as market leaders in e-commerce, to take advantage of the forced and unforced closure of physical stores with digital distribution, cutting into retailers' profits and increasing the burden of rent and debt to private-equity-backed retailers. Further, the emerging trends of online brands, social media apps, and artificial intelligence that customize retail preferences for customers have also dominated the retail landscape and led to financial losses for traditional retailers. Retail bankruptcy filings in 2019 included at least 23 major retailers, with almost 10,000 stores closing, surpassing the retail store closures in 2018 by 59%.²⁶ Online sales made up approximately 16% of the retail sales in 2019, with the number projected to rise to 25% by 2026.²⁷

iii. *The Move Away From Enclosed Regional Malls*

The number of enclosed malls in America peaked in the mid-1980s around 3000. That number had fallen to 1,500 by the mid-1990s²⁸ and as of last year, the number was down to less than 1,000.²⁹ Malls were often developed as the opportunity arose, not necessarily based on demand.³⁰ As new malls were built, many retailers, including anchor tenants like department stores migrated to more recent developments, leaving a trail of "dead" malls behind. Repurposing such malls is possible, but takes significant effort and capital infusion. Pre-pandemic new uses for enclosed malls included medical, education, mega-churches, public libraries, DMVs, apartments, and even homeless shelters, but traditional retailers balk at the idea of being located near such uses.

iv. *Shift To Online Buying*

In 2020, necessity forced locked down consumers to accelerate the shift to e-commerce. 2020 saw over \$860 billion in online sales, accounting for 21% of all retail sales, a 44% increase over 2019 where online sales accounted for 16% of all retail sales.³¹ Online companies, like Amazon, outperformed the in-store retail industry years before COVID-19 by utilizing frictionless shopping process with near-immediate results, often referred to as the Amazon effect.³² This fundamental change in consumer behavior shows no sign of slowing down and is projected to grow another 13.7% in 2021.³³

²⁵ See Tamara Charm, Becca Coggins, Kelsey Robinson and Jamie Wilkie, *The Great Consumer Shift: Ten Charts That Show How US Shopping Behavior Is Changing* (Aug. 4, 2020), <https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/the-great-consumer-shift-ten-charts-that-show-how-us-shopping-behavior-is-changing>.

²⁶ See Aisha Al-Muslim, *U.S. Retail Store Closures Hit Record In First Half* (Sept. 29, 2020), <https://www.wsj.com/articles/u-s-retail-bankruptcies-store-closures-hit-record-in-first-half-11601371800>.

²⁷ See *Id.*

²⁸ See Leanna Garfield, *Here's What Could Happen To America's Hundreds of Dead Malls* (June 1, 2018), <https://www.businessinsider.com/what-will-happen-to-closed-malls-2017-5#before-the-department-store-1>.

²⁹ See Lauren Thomas, *A Third of America's Malls Will Disappear By Next Year, Says Ex-Department Store Exec* (June 10, 2020), <https://www.cnn.com/2020/06/10/a-third-of-americas-malls-will-disappear-by-next-year-jan-kniffen.html>.

³⁰ See Garfield, *supra* note 28.

³¹ See Fareeha Ali, *Charts: How The Coronavirus Is Changing Ecommerce* Feb. 15, 2021), <https://www.digitalcommerce360.com/2021/02/15/ecommerce-during-coronavirus-pandemic-in-charts/>.

³² See Shorr, *The Amazon Effect: Impacts On Shipping And Retail* (June 2015), <https://www.shorr.com/packaging-news/2015-06/amazon-effect-impacts-shipping-and-retail>.

³³ See Fareeha Ali, *US Ecommerce Grows 44.0% In 2020* (Jan. 29, 2021), <https://www.digitalcommerce360.com/article/us-ecommerce-sales/>.

New York & Company³⁴ and Christopher & Banks³⁵ are just two of the examples of another ongoing trend amplified during the pandemic, retailers making the complete shift to e-commerce, commencing first-day liquidation sales at all brick-and-mortar stores. Both retailers filed chapter 11 bankruptcy petitions in 2020 with the stated intention of closing all physical locations and becoming a pure online retailer.

v. *Landlord Acquisitions of Tenants*

2020 also saw the continuation of landlords acquiring retail tenants. Since the start of 2020, various iterations of Simon Property Group, Brookfield Properties Retail, Inc., and Authentic Brands Group purchased a several retailers out of bankruptcy including Brooks Brothers, Forever 21, J.C. Penney, and Lucky Brand Jeans. These acquisitions represented an effort by large mall owners to stabilize vacancy rates in core assets in response to the retail and COVID-19 crisis by keeping key retailers open, “alive” and sustainable.³⁶ Another was more profit-based as investing in certain distressed retailers could provide a “return on investment” for landlords, whether through brick-and-mortar retail units or solely e-commerce operations.³⁷ Further, by teaming up with other shopping owners to acquire anchor and junior anchor tenants such as J.C. Penny and Forever 21, landlords avoid co-tenancy issues and mitigate the impact of adjacent property reciprocal easement agreements on their ability to control future development of their properties.³⁸ Continuing this trend into 2021, outside of the bankruptcy process, Simon Properties recently acquired Eddie Bauer.³⁹

b. **Pandemic Impact on Cases In Progress**

Several retail companies that filed for bankruptcy protection amidst the challenging retail environment that existed immediately pre-COVID were then forced to deal with compounding issues resulting from the outbreak of COVID in March 2020.

Organic specialty grocery chain *Lucky’s Market* owned by Midwest grocery giant Kroger Co. until December 2019, filed for bankruptcy protection on January 27, 2020.⁴⁰ Faced with growing pressure from grocery chains large and small as well as shrinking margins, Lucky’s announced its plan to close 32 of its 39 stores. Established in late in 2002 in Boulder, Colorado, by 2016 Lucky’s had grown to 17 stores in 13 states. In the same year, Kroger made a significant investment in the chain, with plans to use Lucky’s to gain a foothold in the Florida market, adding 11 stores in Florida by the end of 2017.

With the rapid expansion, Lucky’s struggled with a costly labor model, low margins on specialized products and competition from larger chains like Walmart and Aldi that were also increasingly focused on natural and organic foods. At the same time, smaller rival organic chains like Earth Fare and Fresh Thyme were gaining footholds in Florida. Lucky’s needed additional funding to keep up its demand and profits. Ultimately the company borrowed more than \$301 million from Kroger to fund its growth in Florida, but could not sustain its profits. Kroger ultimately divested its interest in the company just prior to Lucky’s filing, but funded a controlled liquidating plan and took assignment of many of the leases not sold to third parties as means of mitigating its liability as a guarantor on those leases.

CraftWorks Parent, LLC and affiliates,⁴¹ which operated various restaurants and breweries including Logan’s Roadhouse (“*Logan’s*”), filed for bankruptcy during March 2020 due to substantially low levels of liquidity amid a market saturation of food and beverage companies.⁴² Logan’s filed a previous bankruptcy in 2016 after its

³⁴ See Kelley Tyko, *New York & Company Closing All Stores In Bankruptcy, Going-Out-of-Business Liquidation Sales Now Underway* (Jul. 13, 2020), <https://www.usatoday.com/story/money/2020/07/13/new-york-co-store-closings-rtw-retailwinds-pandemic-bankruptcy/5427367002/>.

³⁵ See Kelley Tyko, *Christopher & Banks Store Closing Sales: All Locations Liquidating After Retailer Files For Bankruptcy Protection* (Jan. 14, 2021), <https://www.usatoday.com/story/money/shopping/2021/01/14/christopher-banks-stores-closing-chapter-11-bankruptcy-coronavirus/4156233001/>.

³⁶ See Esther Fung, *Property owner Simon Sees Buying Tenants As A Way To Boost Malls* (June 23, 2020), <https://www.wsj.com/articles/property-owner-simon-sees-buying-tenants-as-a-way-to-boost-malls-11592913601>.

³⁷ *Id.*

³⁸ See George Andeson, *Simon Sees A Big And Profitable Upside In Acquiring Retail Tenants* (Aug. 11, 2020), <https://www.retailwire.com/discussion/simon-sees-a-big-and-profitable-upside-in-acquiring-retail-tenants/>.

³⁹ See Reuters, *Simon Property, Authentic Brands To Buy Outdoor Gear Label Eddie Bauer* (May 7, 2021), <https://www.reuters.com/business/simon-property-authentic-brands-buy-outdoor-gear-label-eddie-bauer-2021-05-07/>.

⁴⁰ *In re Lucky’s Market Parent Co., LLC*, No. 20-10166 (JTD) (Bankr. D. Del. 2020).

⁴¹ *In re CraftWorks Parent, LLC*, No. 20-10475 (BLS) (Bankr. D. Del. 2020).

⁴² Declaration of Hazem Ouf in Support of Chapter 11 Petitions and First Day Pleadings, *CraftWorks*, No. 20-10475 (Dkt. No. 17).

sales fell by 11% to \$587 million.⁴³ Sales continued to fall in the coming years and CraftWorks ultimately acquired Logan's in 2018.⁴⁴ The sales declines were due to various macro- and microeconomic factors that were impacting nearly all casual dining restaurants in the industry.⁴⁵ Market pressures and rising wages were driving up costs, plus dine-in patrons' numbers were decreasing.⁴⁶ Restaurants faced increased competition from online third-party food delivery platforms, such as UberEats, DoorDash, and GrubHub, as patrons increasingly chose to eat via takeout, and from pre-packaged, ready-to-cook meal services such as Blue Apron and Hello Fresh.⁴⁷

Due to challenges in the casual dining industry, CraftWorks was negatively impacted by an "overleveraged capital structure and low levels of liquidity" that hindered its ability to sustain operations.⁴⁸ CraftWorks entered bankruptcy with \$235 million in debt and a stalking horse bid from secured lender, Fortress.⁴⁹ However, when COVID-19 hit the U.S., Craftworks faced further losses in revenue and requested that the bankruptcy court "mothball," or put on pause (over the objections of landlords and various creditors) its case to preserve the value of its business moving forward. After significant uncertainty about the continuation of the sale process, the Court eventually approved the sale of CraftWorks to Fortress in a \$93 million credit bid, with the plan to keep at least 150 restaurants in operation.⁵⁰

Pier 1 Imports, the well-known home décor chain, filed its chapter 11 petition on February 17, 2020⁵¹ after struggling for years in the challenging retail landscape. By late 2019, Pier 1 was in dire straits; year-over-year losses doubled with annual sales down 14%, as it faced competition with newer, cheaper home décor brands, such as West Elm and Target and specialty online players such as Wayfair.⁵² Pier 1 filed for bankruptcy protection intending keep the company moving forward by shifting its marketing strategy (*i.e.*, building up its e-commerce business), shedding hundreds of underperforming stores, and consolidating distribution centers in an attempt to respond to both online and brick-and-mortar competition.⁵³

Unfortunately, Pier 1's plan was derailed by the COVID-related store closures. After the pandemic hit and during lockdown, the bankruptcy court permitted the debtor to defer rent payments for 60 days, opining that the landlord's interest in the property remained protected because all owed rent would be paid eventually and debtors would continue to pay other obligations, such as insurance, utility, and taxes.⁵⁴

Ultimately, the impact of store closures on Pier 1's existing financial distress eliminated any hope of finding a going-concern buyer or restructuring its balance sheet.⁵⁵ Left with no other options, the company was forced to wind down retail operations and liquidate all remaining assets, including its intellectual property and e-commerce business.⁵⁶ It remains to be seen whether all administrative claims will be satisfied and whether any distribution will be available for unsecured creditors.

Modell's Sporting Goods, one of the oldest family-owned US sporting goods retailers, filed for bankruptcy just days before much of the country went into lockdown on March 11, 2020⁵⁷ due to "adverse market trends", sales

⁴³ See Julie Littman, *Logan's Roadhouse Parent Closes All Restaurants* (Mar. 23, 2020), <https://www.restaurantdive.com/news/logans-roadhouse-parent-files-for-bankruptcy/573462/>.

⁴⁴ *Id.*

⁴⁵ Declaration of Hazem Ouf in Support of Chapter 11 Petitions and First Day Pleadings, *CraftWorks*, No. 20-10475 (Dkt. No. 17).

⁴⁶ See Jennings, Strouss & Salmon, PLC, *Restaurants Continue to Face Uncertain Times Due to the Impact of COVID-19* (February 5, 2021), <https://www.jdsupra.com/legalnews/restaurants-continue-to-face-uncertain-9573167/>.

⁴⁷ *See Id.*

⁴⁸ Declaration of Hazem Ouf in Support of Chapter 11 Petitions and First Day Pleadings, *CraftWorks*, No. 20-10475 (Dkt. No. 17).

⁴⁹ *Id.*

⁵⁰ See Rose Krebs, *Craftworks Ok'd For Ch. 11 Sale That Hands Assets To Lender* (May 20, 2020), <https://www.law360.com/articles/1275475/craftworks-ok-d-for-ch-11-sale-that-hands-assets-to-lender>.

⁵¹ *In re Pier 1 Imports, Inc.*, No. 20-30805 (KRH) (Bankr. E.D. Va. 2020).

⁵² Declaration of Robert J. Riesbeck, Chief Executive Officer and Chief Financial Officer of Pier 1 Imports, Inc., in Support of Chapter 11 Petitions and First Day Motions, *Pier 1*, No. 20-30805 (Dkt. No. 30).

⁵³ *Id.*

⁵⁴ The New Jersey Bankruptcy court in *Modell's Sporting Goods, Inc.* and the Delaware Bankruptcy Court in *CraftWorks* also allowed a similar rent-deferral period in their bankruptcy proceedings due to the respective debtors' inability to generate revenue and to focus on long-term success. See Mark Douglas & Dan Moss, *Mothballing Bankruptcy Cases In the Covid-19 Crisis*, 2020 WLNR 16193961 (2020).

⁵⁵ See Vince Sullivan, *Pier 1 Shifts To Permanent Shutdown In Ch. 11 Case* (May 19, 2020), <https://www.law360.com/articles/1275186/pier-1-shifts-to-permanent-shutdown-plan-in-ch-11-case>.

⁵⁶ *See Id.*

⁵⁷ *In re Modell's Sporting Goods, Inc.*, No. 20-14179 (VFP) (Bankr. D.N.J.) (orders dated Mar. 27 and Apr. 30, 2020).

shifting away “from traditional brick-and-mortar retailers to online retailers” and “increased competition from big-box specialty sporting goods retailers” like Dick’s Sporting Goods.⁵⁸ Additionally, “a decline in sports team participation among youth and teens and changing consumer preferences”⁵⁹ led to an industry-wide weakness in the Modell’s demographics, which was reflected by the bankruptcy filings of several of Modell’s competitors, including Sports Authority and City Sports.⁶⁰

Entering bankruptcy as a liquidation, when the pandemic shut down going out of business sales, Modell’s took the unusual and novel approach of seeking a 60-day deferral of rent payments under section 365(d)(3) of the Bankruptcy Code and a suspension of the case under section 305(a) of the Bankruptcy Code until the lock down was lifted to allow for the exploration of out-of-court options and to increase liquidity. While the case was in hibernation, the debtors, secured lenders, and a group of the debtors’ major landlords went into mediation to negotiate a consensual budget covering Modell’s rent obligations during the March pre-lockdown GOB sales and the debtors’ lease obligations during the “lockdown” period. After several weeks of mediation, the parties agreed on an interim payment that provided landlords with payment for out of pocket expenses incurred during the lockdown and from the proceeds of store closing sales as soon as they recommenced in, while reserving the parties’ rights with respect to the balance of unpaid rent.

c. Changes Caused By COVID

As retailers faced the downturn and increasing e-commerce competition, the pandemic compounded financial difficulties with government mandated lockdowns and the closure of nonessential businesses. The impact of COVID-19 restrictions, combined with trending consumer preferences to seek their products and services online, directly increased bankruptcy filings of well-known brick-and-mortar brands.⁶¹

With mandatory shutdowns beginning in the spring of 2020, all retail companies with brick-and-mortar stores faced a precipitous drop in demand for their products and services, with some attempting to adapt their business models to the pandemic and others seeking bankruptcy protection or selling their assets. Supermarkets and grocery stores faced a rapid demand for online grocery services as social distancing protocols shifted consumer preference for ordering groceries online rather than directly in store. Mall operators and retailers that were financially vulnerable prior to the viral outbreak found their issues with liquidity and debt to be worsened due to the temporary and permanent closures of the majority of stores.⁶² The closure of nonessential shopping centers led to a ripple effect for mall based landlords, as tenant debtors suspended and litigated bankruptcy payment obligations. In most cases, landlords agreed to provide tenants with rent relief and concessions in the wake of COVID-19, providing significant abatement and deferral of lease obligations lasting into late 2020, 2021, and 2022.

i. The Bankruptcy Code Was Amended

1. Subchapter V Bankruptcy – Increased Debt Limit

The Small Business Reorganization Act (SBRA)⁶³ was signed into law on August 23, 2019, codified and created a new subchapter, Subchapter V, of chapter 11 of the Bankruptcy Code. Subchapter V provides an avenue for smaller businesses to pursue a streamlined reorganization while retaining control over their business operations and without expending substantial assets. A few things distinguish Subchapter V filings from regular chapter 11 filings: (i) a committee of creditors is not required to be appointed unless ordered by the bankruptcy court for cause (minimizing costs, but potentially harming creditors); (ii) debtors only have to file a plan of reorganization and are exempt from filing a disclosure statement or dealing with completing plans; (iii) a proposed plan must be filed within 90 days (and not the usual 180 days required in chapter 11); (iv) the plan must provide that all projected disposable income for three to five years will be used to make plan payments; and (iv) a Subchapter V trustee is appointed to facilitate a consensual plan and is paid relatively minimal fees.

⁵⁸ Declaration of Robert J. Duffy in Support of Debtors’ Chapter 11 Petitions and First Day Motions, *Modell’s*, No. 20-14179 (Dkt No. 24).

⁵⁹ *Id.*

⁶⁰ *In re TSA WD Holdings, Inc., et al.*, Case No. 16-10527 (MFW) (Bankr. D. Del. 2017); *In re City Sports Inc.*, 554 B.R. 329 Bankr. D. Del. 2016).

⁶¹ Some of the major retail bankruptcy filings accelerated due to the COVID-19 outbreak include J.C. Penney, Ascena Retail Group, Pier 1 Imports, Stein Mart, Neiman Marcus, J. Crew, and Tailored Brands.

⁶² See Kim Souza, *The Supply Side; Retail Bankruptcies Hasten in the Wake of COVID-19 Pandemic*, 2020 WLNR 15157342 (2020).

⁶³ Small Business Reorganization Act of 2019, H.R. 3311, 116th Cong. (2019-2020).

Although the SBRA wasn't initially passed with COVID-19 in mind, the SBRA's February 2020 effective date provided small businesses with an "unintended lifeline in the wake of COVID-19."⁶⁴ To be eligible for Subchapter V relief, Debtors had to have less than \$2.7 million in debt and at least half of that debt must arise from commercial or business activity.⁶⁵ However, in the wake of COVID, the SBRA was modified, albeit temporarily through the CARES Act⁶⁶ to raise the maximum qualifying debt level from approximately \$2.7 million to \$7.5 million, through March 27, 2021.⁶⁷ The temporary debt limit increase was subsequently extended through March 27, 2022 by Congress' enactment of the COVID-19 Bankruptcy Relief Extension Act of 2021,⁶⁸ which was passed on March 26, 2021. With the debt level increase, smaller businesses have increasingly filed under Subchapter V during the pandemic as a more direct path to restructuring. Since the enactment of SBRA, "80 percent of small business debtors have chosen to proceed under the provisions of this bill..."⁶⁹

*Furla USA*⁷⁰, a niche, boutique-style luxury goods store, filed for Subchapter V bankruptcy on November 6, 2020 in the wake of COVID in an effort to benefit from the "streamlined process" offered to smaller businesses by Subchapter V.⁷¹ During the reorganization process, Furla "shed unprofitable leases, reorganized its work force, and strengthened its capital structure" in order to emerge from bankruptcy with a "healthy balance sheet".⁷² The Subchapter V filing allowed the company to reconfigure its business model and retail footprint.⁷³ After three months, the court approved the plan of reorganization and noted that Furla "from the outset and through today has been a model of how [Subchapter V bankruptcies] ought to go."⁷⁴

Solstice Marketing Concepts LLC,⁷⁵ the second-largest retailer of sunglasses in the U.S., filed for Subchapter V bankruptcy on February 17, 2021. Solstice was operating 66 stores across the U.S. at the time, but suffered losses of more than 50% in retail sales during the pandemic as compared to 2019.⁷⁶ Despite a stand-still in their retail operations due to COVID-19, Solstice attempted to boost their liquidity through third-party financing and continued negotiations with landlords to explore options for outstanding lease obligations.⁷⁷ Debtors recognized the ongoing rapid shift to online channels by their customer base and were seeking to formulate a plan that would incorporate both brick-and-mortar and e-commerce business units. Debtors noted that its rehabilitation would hinge on the efficiency of Subchapter V.⁷⁸ This case is ongoing and approaching plan confirmation in July 2021..

2. Extension of the 365(d)(4) Deadline to Assume or Reject Leases

In response to the economic distress spurred by the pandemic and to supplement the CARES Act, Congress also signed The Consolidated Appropriations Act of 2021 (the "CAA")⁷⁹ into law on December 27, 2020. The CAA included certain amendments to the Bankruptcy Code which significantly impacted commercial landlords and tenants. Although temporary and set to sunset two years after CAA's enactment (i.e. on December 27, 2022),

⁶⁴ See George B. Cauthen, Randall L. Saunders, Jonah Samples, *The Small Business Reorganization Act: An Unintended Lifeline For Small Businesses Considering Restructuring Due To COVID-19* (Aug. 24, 2020), https://www.nelsonmullins.com/idea_exchange/insights/the-small-business-reorganization-act-an-unintended-lifeline-for-small-businesses-considering-restructuring-due-to-covid-19.

⁶⁵ See U.S. Dep't of Justice, Public Affairs Div., U.S. Trustee Program Ready to Implement the Small Business Reorganization Act of 2019 (Feb. 19, 2020), accessed at <https://www.justice.gov/opa/pr/us-trustee-program-ready-to-implement-small-business-reorganization-act-2019> (press release).

⁶⁶ CARES Act (Coronavirus Aid, Relief, and Economic Security Act), H.R. 748, 116th Cong. (2020), <https://www.cbo.gov/publication/56334>.

⁶⁷ See Michele S. Assayag and Joshua Partington, *Debt Limit Increase Of Subchapter V of Chapter 11 Of Bankruptcy Code Extended* (Apr. 6, 2021), <https://www.jdsupra.com/legalnews/debt-limit-increase-of-subchapter-v-of-2778574/>.

⁶⁸ COVID Bankruptcy Relief Extension Act of 2021, H.R. 1651, 117th Cong. (2021-2022).

⁶⁹ See Assayag and Partington, *supra* note 75; see also *Sizzler USA Finance, Inc.*, No. 20-51402 (Bankr. N.D. Cal. 2020); *In re Crave Brands, LLC*, No. 21-04729 (N.D. Ill. 2021) (both filing under subchapter V).

⁷⁰ *In re Furla U.S.A., Inc.*, No. 20-12604 (SCC) (Bankr. S.D.N.Y. 2020).

⁷¹ Morrison Cohen LLP, *Court Approves Chapter 11 Reorganization Plan for Furla USA* (January 28, 2021), <https://www.morrisoncohen.com/news-page?itemid=4822>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *In re Solstice Marketing Concepts LLC*, No. 21-10306 (MG) (S.D.N.Y. 2021).

⁷⁶ See Eyewear Intelligence, *Solstice Sunglasses Files For Bankruptcy Protection* (February 25, 2021), <https://www.ewintelligence.com/corporate-and-manda/solstice-sunglasses-files-for-bankruptcy-protection/87503.article>.

⁷⁷ See *Id.*

⁷⁸ *Id.*

⁷⁹ The Consolidated Appropriations Act of 2020, H.R. 133, 116th Cong. (2020-2021).

sections 365(d)(3)⁸⁰ and (d)(4) were notably amended to provide debtors with more time to preserve the going-concern value of their businesses and to negotiate with landlords regarding their leases.

Prior to the enactment of the CAA, section 365(d)(4) of the Code provided a debtor that is a lessee under a non-residential real property lease with an automatic 120-day period to assume or reject the lease, with the right to move for an additional 90-day extension for “cause” shown.⁸¹ The CAA extended the automatic 120-day period to 210 days while retaining the debtor’s right to move to extend the automatic 210-day deadline by an additional 90 days for any “cause” shown. Therefore, the debtor now have up to 300 days to determine whether to assume or reject a non-residential real property lease, providing certain benefits as to negotiations between landlords and tenants, but also instilling uncertainty in the timely performance of tenant obligations under their leases.

3. Section 547 Good Samaritan Preference Defense

Section 547 of the Bankruptcy Code enables a debtor-in-possession or trustee to “claw back” certain payments made by a debtor to its creditors in the 90 days preceding a bankruptcy case, unless the creditor can establish one of the statutory defenses, including: (i) the payment was made in the ordinary course of business or according to ordinary business terms; (ii) the creditor provided additional goods and services to the debtor on credit after receiving the payment (i.e. the New Value defense); or (iii) the payment was made at the same time as the creditor provided goods or services to the debtor (i.e., a contemporaneous exchange).⁸²

The CAA amendment to section 547 of the Code provided protections for landlords in that they were no longer subject to returning any such payments made during the 90-day period prior to the commencement of the bankruptcy case if they were made under an agreement to defer rent subsequent to March 13, 2020. Such change was intended to encourage rent deferral arrangements between landlords and tenants and therefore only applies to rent payments, and not to the payment of fees, penalties, or interest the debtor may have otherwise owed without the deferral. In line with the other amendments, this change will sunset on December 27, 2022, but will continue to apply to any bankruptcy case commenced before such date.⁸³

II. Companies Liquidated Because Of COVID-19

*Pier 1 Imports*⁸⁴ filed for bankruptcy pre-pandemic intending to conduct a court-supervised sale process and complete a going concern sale via a chapter 11 plan.⁸⁵ For months, the company worked diligently with strategic buyers and investors to operate its business going forward and continued negotiations with landlords regarding their leases in an effort to consolidate and reorganize their store footprint.⁸⁶ At the same time, the onset of COVID-19 brought with it government mandated closures of non-essential retail operations and uncertain market conditions. Consequently, Pier 1’s ongoing negotiations with potential going-concern bidders were stalled and brought to an end as the only bids received at the time were liquidating bids.⁸⁷ Ultimately, despite efforts to preserve liquidity, including employee furloughs and lease modification negotiations with landlords, the company’s only option was to conduct a full-scale, orderly wind-down of its operations and a liquidation of all inventory and assets in closing stores.

III. Supermarkets And Grocery Stores – Business Improved

⁸⁰ Section 365(d)(3) of the Bankruptcy Code was amended to permit an extension of up to 120-days following the commencement of a case, regarding the time within which a small business debtor in a Subchapter V Chapter 11 case has to perform post-petition obligations under an unexpired lease of nonresidential real property. This extension is permitted if the debtor has experienced a material financial hardship due to COVID-19.

⁸¹ See JDSupra, *Consolidated Appropriations Act of 2021 Amends Bankruptcy Code – Part 2: Amendments Affecting Mortgage Lenders and Landlords* (Feb. 1, 2021), <https://www.jdsupra.com/legalnews/consolidated-appropriations-act-of-2021-6833045/>.

⁸² See Joseph R. Dunn and Abigail O’Brien, *Consolidated Appropriations Act of 2021 Amends Bankruptcy Code* (Feb. 2, 2021), <https://www.mintz.com/insights-center/viewpoints/2831/2021-02-01-consolidated-appropriations-act-2021-amends-bankruptcy>.

⁸³ See Ben Feder, *Commercial landlords Take Note-COVID Relief Bill Contains Important Bankruptcy Code Amendments* (Jan. 12, 2021), <https://www.bankruptcylawinsights.com/2021/01/commercial-landlords-take-note-covid-relief-bill-contains-important-bankruptcy-code-amendments/>; see also Robert L. LeHane and Kristin Elliott, *COVID-19: “Avoiding” Harm to Corporate Good Samaritans* (Apr. 16, 2020), <https://www.bankruptcylawinsights.com/2020/04/covid-19-avoiding-harm-to-corporate-good-samaritans/>.

⁸⁴ *In re Pier 1 Imports, Inc.*, No. 20-30805 (KRH) (Bankr. E.D. Va. 2020).

⁸⁵ See *Pier 1*, No. 20-30805 (Dkt. No. 30).

⁸⁶ See Vince Sullivan, *Pier 1 Shifts To Permanent Shutdown Plan In Ch. 11 Case* (May 19, 2020), <https://www.law360.com/articles/1275186/pier-1-shifts-to-permanent-shutdown-plan-in-ch-11-case>.

⁸⁷ See *Id.*

Grocery shopping also faced substantial impact by COVID-19 as store closures and regulations urged everyone to stay home and social distance. Due to a lack of foot traffic in supermarkets and grocery stores, COVID-19 rapidly accelerated the growth of online grocery shopping, with the food and beverage industry deemed to be the fastest-growing e-commerce category in the U.S. in 2020.⁸⁸ Companies, such as Amazon and Walmart, have incentivized online grocery shopping and delivery services by integrating attractive discounts and promotions, providing fulfillment options such as free curbside pickup and home delivery and increasing the capacity of their products and services. Grocers looking to efficiently fill online orders have increasingly used micro-fulfillment systems (*i.e.*, FreshDirect) to tamp down costs while speeding up deliveries. Platforms like Instacart and Shipt have created a demand for online grocery orders and deliveries and expanded customer access by working with hundreds of retail companies to distribute products. In 2020, the online grocery's percentage of the grocery market was at 10.2% (\$106 billion), up from 3.4% (\$34.54 billion) in 2019, and is projected to climb to \$250.26 billion of the overall grocery market (\$1.16 trillion) by 2025.⁸⁹

IV. Suspension/Litigation Of Lease Payment Obligations

1. State Courts Closed – Moratorium on Evictions

COVID-19 hit commercial landlords particularly hard as most retail debtor tenants suspended and litigated rent payment obligations, arguing that government-mandated closures of non-essential businesses constituted *force majeure*, an act of God which justifies not paying rent. Unlike the nationwide residential eviction moratorium enacted by the CDC, there was no similar nationwide moratorium on commercial evictions. Further, many state and local governments entered orders protecting commercial tenants from filing suit to evict or collect overdue rent during the height of the public health emergency. In states like New York, the governor issued orders that placed a temporary moratorium on evictions for both residential and commercial tenants for a certain time period (*i.e.*, 90 days), which were extended through the onset of COVID-19 to provide ongoing protections for tenants.⁹⁰ Furthermore, with the temporary closure of several state courts during the pandemic, creditors relied on section 362(a) of the Bankruptcy Code, the automatic stay provision, as a protective measure against any pending litigation.

2. Rent Deferrals under Section 365(d)(3) and Mothball Motions

Retailers that filed for bankruptcy due to COVID-19 cited the pandemic and its effects as reason to defer payment of their post-petition rents. Debtors argued that because they had been forced to “mothball,” or halt the operations of their store locations, any obligations to pay current rents should be postponed until they were able to reopen store locations and resume operations. These mothball motions, allowed debtors to reduce operational expenses under the shield of bankruptcy protection with hopes of reopening stores locations within a period of months. In response, commercial landlords objected on grounds that section 365(d)(3) of the Bankruptcy Code, requires timely performance of post-petition lease obligations, which mandates the payment of rent as it comes due at the latest on the 60th day of the case. At the outset of the pandemic, landlord objections were largely over-ruled, landlords were forced to accept the debtors’ minimal payment of out of pocket expenses, such as maintenance or utilities, as “adequate protection” during rent deferral periods.

Most bankruptcy courts granted mothball motions, allowing debtors to remain in possession of their premises while temporarily deferring rental payments. In *24 Hour Fitness*,⁹¹ the Delaware bankruptcy court granted a 60-day deferral of approximately \$65 million in rent payments due to the liquidity constraints and uncertainty faced by Debtors as a result of COVID-19.⁹² The judge granted the deferral to help the debtors reduce a “cash burn” and be in a better position to obtain debtor-in-possession financing and restructure \$1.4 billion in secured debt.⁹³ Similarly, in the bankruptcy case of *J.C. Penney*,⁹⁴ which filed for chapter 11 protection on May 15, 2020, the Texas

⁸⁸ See Insider, *Food And Beverage Will See Biggest Gains In Retail Ecommerce Sales Growth This Year* (Aug. 27, 2020), <https://www.businessinsider.com/food-beverage-will-see-biggest-retail-ecommerce-sales-growth-2020-8>.

⁸⁹ See Russell Redman, *Online Grocery To More Than Double Market Share By 2025* (Sept. 18, 2020), <https://www.supermarketnews.com/online-retail/online-grocery-more-double-market-share-2025>.

⁹⁰ On March 20, 2020, Governor Andrew Cuomo issued Executive Order 202.8, which included a 90-day moratorium on evictions for residential and commercial tenants, and foreclosures of any residential or commercial property. Exec. Order. No. § 202.8. This order was extended to November 4, 2020. Executive Order No. 202.72 provided additional commercial tenant protections by providing them with a 60-day window to respond to pending nonpayment cases that had been filed against them. Exec. Order. No. § 202.72.

⁹¹ *In re 24 Hour Fitness Worldwide, Inc.*, No. 20-11558 (KBO) (Bankr. D. Del. 2020).

⁹² See Rose Krebs, *24 Hour Fitness Rent Deferral Ok'd Over Landlord Outcry* (July 1, 2020), <https://www.law360.com/articles/1288720/24-hour-fitness-rent-deferral-ok-d-over-landlord-outcry>.

⁹³ See *Id.*

⁹⁴ *In re J.C. Penney Co. Inc.*, No. 20-20182 (DRJ) (Bankr. S.D. Tex. 2020).

bankruptcy court granted debtors' request to delay \$34 million in rent payments until July 13, 2020.⁹⁵ Although landlords objected arguing that J.C. Penney had ample resources to pay rent as it had already reopened 475 stores, the company argued that a rent deferral would help negotiate rent-relief agreements with landlords.⁹⁶ To the dismay of the landlord community, the court agreed, granting the deferral.

Similarly, the court in *J. Crew*⁹⁷ allowed a two-month deferral of rent payments, despite objections from more than a dozen landlords.⁹⁸ The court found that the relief was necessary for debtors to adhere to its \$400 million budget and emphasized that any action seeking to enforce lease obligations would be stayed during the 60-day deferral period and that no adequate-protection payments were required.⁹⁹ Other retailers, such as *Neiman Marcus*,¹⁰⁰ *Gold's Gym*,¹⁰¹ *Stage Stores*,¹⁰² *Tuesday Morning*,¹⁰³ and *Ruby Tuesday*¹⁰⁴ obtained similar results. A statute expressly intended to insure payment of post-petition rent for the commercial landlord, was uniformly construed liberally by multiple courts given the extraordinary circumstances presented by the global pandemic.

In addition to relying on section 365(d)(3) of the Bankruptcy Code to request rent deferrals, debtors also used non-payment litigation methods¹⁰⁵ and asserted state law defenses based upon *force majeure* provisions and the equitable doctrines of impossibility and frustration of purpose in an effort to be excused of rent obligations.¹⁰⁶ Although courts have varied with their application of these doctrines, major retail bankruptcies have provided some insight into how courts have interpreted such doctrines in accordance with debtors' leases.

3. Non-Payment Litigation – Force Majeure, Impossibility, and Frustration of Purpose

During the Pandemic, in some cases, tenants and landlords pursued litigation over the issue of whether rent was due with tenants often asserting the effect of force majeure provisions and the doctrines of impossibility and frustration of purpose on their duty to perform under the lease agreement. In response to these arguments, many landlords have contended that their interest in leased premises occupied by a debtor during a bankruptcy case, particularly in the case of rent deferral, is entitled to some form of "adequate protection" under section 361 of the Bankruptcy Code. This "adequate protection" can be in the form of periodic cash payments, additional or replacement liens, or an administrative expense claim designed to compensate for any diminution in value of a creditor's interest in property. In the wake of COVID-19, Debtors have attempted to demonstrate that something other than periodic, immediate payments of rent owed under the lease could provide adequate protection to landlords.

In *CEC Entertainment, Inc.*,¹⁰⁷ the debtors quickly obtained a 60-day rent deferral soon after filing their petitions.¹⁰⁸ Later in the cases, the debtors sought to suspend their rental obligations further based on a number of theories, including state law defenses of *force majeure*, frustration of purpose, and impossibility of

⁹⁵ See Rick Archer, *J.C. Penney Gets Nod To Postpone \$34M In Rent Payments* (June 11, 2020), <https://www.law360.com/articles/1282283/jc-penney-gets-nod-to-postpone-34m-in-rent-payments>.

⁹⁶ See *Id.*

⁹⁷ *In re Chinos Holdings Inc.*, No. 20-32181 (KLP) (Bankr. E.D. Va. 2020).

⁹⁸ See Vince Sullivan, *Bankrupt J. Crew Cleared To Delay Rent Payments For 60 Days* (May 26, 2020), <https://www.law360.com/articles/1276916/bankrupt-j-crew-cleared-to-delay-rent-payments-for-60-days>.

⁹⁹ See *Id.*

¹⁰⁰ *In re Neiman Marcus Group LTD LLC, et al.*, No. 20-32519 (DRJ) (Bankr. S.D. Tex. 2020).

¹⁰¹ *In re Gold's Gym International, Inc.*, No. 20-31319 (Bankr. N.D. Tex. 2020).

¹⁰² *In re Stage Stores, Inc., et al.*, No. 20-32564 (DRJ) (Bankr. S.D. Tex. 2020).

¹⁰³ *In re Tuesday Morning Corporation, et al.*, No. 31476 (HDH) (Bank. N.D. Tex. 2020).

¹⁰⁴ *In re RTI Holding Company, LLC*, No. 20-12456 (JTD) (Bankr. D. Del. 2020). On October 22, 2020, the Delaware court in *Ruby Tuesday* granted Debtors a two-month rent payment deferral of approximately \$5.5 million based in part on the company's plan to provide landlords with a share of a \$22.5 million Rabbi trust fund as part of its deferred compensation plan. See Rick Archer, *Ruby Tuesday Gets 2-Month Rent Payment Deferral In Ch. 11* (October 22, 2020), <https://www.law360.com/articles/1322043/ruby-tuesday-gets-2-month-rent-payment-deferral-in-ch-11>.

¹⁰⁵ *Ruby Tuesday* requested further abatement of rent through the implementation of a litigation schedule that would allow for "expedited adjudication" of state law issues, such as *force majeure* clauses. The court granted the schedule, which bifurcated the rent abatement litigation into a determination phase, where the court would decide whether impossibility of performance or frustration of purpose applied under the circumstances; and a quantifying phase where the court would decide if rent abatement was warranted under Debtors' leases. See *Id.*

¹⁰⁶ See Paige Bartholomew, *Commercial Division Again Rejects Commercial Tenant's Impossibility/Frustration Of Purpose Defenses In The Wake Of COVID-19* (May 28, 2021), <https://www.jdsupra.com/legalnews/commercial-division-again-rejects-1503864/>.

¹⁰⁷ *In re CEC Entertainment, Inc., et al.*, 2020 WL 7356380 (Bankr. S.D. Tex. 2020).

¹⁰⁸ See Patrick J. Potter, Patrick E. Fitzmaurice, Brian L. Beckerman, Kwame O. Akuffo, *Bankruptcy Court Denies Retail Debtor's State-Law Based Arguments to Avoid Paying Rent During Chapter 11* (January 19, 2021), <https://www.jdsupra.com/legalnews/bankruptcy-court-denies-retail-debtor-s-9446624/>.

performance.¹⁰⁹ The company argued that it should be excused from rent payments as a matter of state law because: (i) the COVID-19 pandemic and related governmental regulations triggered the *force majeure* clauses in their leases; and (ii) governmental regulations limiting operations frustrated the fundamental purpose of the leases. After multiple adjournments that allowed negotiations with many landlords to play out, the court ultimately rejected both arguments. The CEC court first concluded that most of the *force majeure* lease provisions at issue excluded language involving “the inability to pay any sum of money due” as a *force majeure* event that would excuse performance. This was distinguishable from *In re Hitz*, where the court recognized COVID regulations as triggering the *force majeure* provisions of the Debtors’ leases.¹¹⁰ Furthermore, the CEC court then turned to the frustration of purpose argument and rejected it on the basis that: (i) a tenant cannot avail itself of the frustration doctrine where the parties had already allocated such risks in the lease; and (ii) even if the doctrine did apply, the purpose of the leases could not have been frustrated because the leased premises could be put to other uses. Because CEC planned to assume leases as part of its plan of reorganization, the leases by their very nature were not rendered valueless.

Cinemex,¹¹¹ an operator of upscale dine-in movie theaters, sought to delay or excuse payment of rent due to government-mandated theater shutdowns during the pandemic.¹¹² The company relied on both the frustration of purpose and impossibility doctrines to excuse their rental obligations, arguing that Florida’s governmental shut-down of theaters completely interfered with the purpose of the leases and therefore could not be fulfilled due to the lack of new film releases and consumer reluctance to watch movies, asserting this even after the theaters had opened at reduced capacity. The court granted rent relief for those periods during which the debtor was legally prohibited from opening but not for the periods where it had chosen to stay close due to diminished business.¹¹³

d. Companies That Survived COVID-19

Despite the effects of COVID-19 on the retail industry, many companies that filed for bankruptcy protection, including those in the retail, entertainment, fitness, and food/beverage sectors, successfully restructured and emerge from bankruptcy. Several of these companies showed a common denominator of refocusing business operations and liquidity on a retail footprint and e-commerce and engaging in effective lease negotiations with landlords to preserve the going forward value of the company. Further, through negotiations between debtors and key economic stakeholders, these companies were able to reach agreements that provided an equitable and favorable treatment of creditor claims and interests under the Plan.

Restaurants during the pandemic refocused their business model on the growing demand for take-out and delivery services, in an effort to combat the mandatory shut-downs of dine-in operations. Fast-food, fast-casual, and casual dining restaurants, such as Sonic, were able to implement their to-go/carry out operations more efficiently as part of their business model. In fact, after *SD-Charlotte, LLC, et al.*¹¹⁴ filed for bankruptcy in February 2020, Sonic Drive-In, announced its plan to acquire at least 73 restaurants as part of its investment in the company and to maintain employment for Sonic team members throughout the country.¹¹⁵ Similarly, TooJay’s Deli,¹¹⁶ a Florida-based restaurant chain, emerged successfully from bankruptcy after completing its debt restructuring process and having its 28 locations acquired by asset management firm Monroe Capital.¹¹⁷

Department stores, like *Belk*,¹¹⁸ successfully emerged from bankruptcy through a strategy of increased liquidity and a focus on key initiatives for growth, such as expanding their merchandise offerings into new, relevant product categories based on their customer base and demographic trends. *Belk* filed for chapter 11 bankruptcy

¹⁰⁹ See *Id.*

¹¹⁰ *In re Hitz Restaurant Group*, 616 B.R. 374 (Bankr. N.D.Ill. 2020).

¹¹¹ *In re Cinemex USA Real Estate Holdings, Inc, et al.*, 2021 WL 564486 (Bankr. S.D. Fla. 2021).

¹¹² See Nathan Hale, *Bankrupt Movie Theater Pushes Bid For Rent Relief In Fla.* (June 29, 2020), <https://www.law360.com/articles/1287609>.

¹¹³ See *Id.* As discussed above, the debtors in Pier 1 Imports and Modell’s Sporting Goods also sought rent deferrals under a number of theories.

¹¹⁴ *In re SD-Charlotte, LLC, et al.*, No. 20-30149 (LTB) (Bankr. W.D.N.C. 2020).

¹¹⁵ See Jennifer Thomas, *Sonic To Acquire Drive-in Restaurants After Local Franchisee SD Holdings Files For Bankruptcy* (February 11, 2020), <https://www.bizjournals.com/charlotte/news/2020/02/11/sonic-to-acquire-drive-in-restaurants-after-local.html>.

¹¹⁶ *In re TooJay’s Management LLC*, No. 20-14792 (EPK) (Bankr. S.D.Fla. 2020).

¹¹⁷ See Heather Lalley, *TooJay’s Deli Has A New Owner, Emerges From Bankruptcy Protection* (September 10, 2020), <https://www.restaurantbusinessonline.com/financing/toojays-deli-has-new-owner-emerges-bankruptcy-protection>.

¹¹⁸ *In re Belk, Inc., et al.*, No. 21-30630 (MI) (Bankr. S.D. Tex. 2020); see also *In re Tailored Brands, Inc.*, No. 20-33900 (MI) (Bankr. S.D. Tex. 2020); *In re True Religion Apparel, Inc., et al.*, No. 20-10941 (CSS) (Bankr. D. Del. 2020); *In re Retail Group, Inc., et al.*, No. 20-33113 (KRH) (Bankr. E.D.V.A. 2020); *In re It’Sugar FL I LLC*, No. 20-20259 (Bankr. S.D.Fla. 2020); *In re GNC Holdings, Inc.*, No. 20-11662 (KBO) (Bankr. D. Del. 2020); *In re L’Occitane, Inc.*, No. 21-10632 (MBK) (Bankr. D.N.J. 2020); *In re Paper Source, Inc.*, No. 21-30660 (KLP) (Bankr. E.D. Va. 2021); *In re The Paper Store, LLC, et al.*, No. 20-40743 (CJP) (Bankr. D. Ma. 2020).

protection with a lender-supported prepackaged reorganization plan that would eliminate \$450 million in debt and keep its 291-store footprint intact.¹¹⁹ Only a day after filing, the company won court approval of its plan.¹²⁰

Even in the fitness¹²¹ and entertainment¹²² sectors of the retail industry, where government-mandated shutdowns spurred by COVID-19 completely halted business operations, companies found a way to get their restructuring plans confirmed and provide some level of recovery to various creditors. However, these recoveries were often limited, particularly for general unsecured creditors, which include landlords with rejected leases, vendors, and operational creditors. For example, in *Cinemex Holdings USA Inc.*,¹²³ the court confirmed the bankruptcy exit plan, which was expected to provide up to \$60 million to the estate to pay various creditors and administrative expenses. General unsecured creditors under the plan were projected to receive about \$5.5 million overall, or 13 cents on the dollar. Despite minimal recovery to general unsecured creditors and about \$3.2 million owed in rent (\$100 million in debt overall), Cinemex was able to renegotiate their profitable leases with various landlords and enter into revenue-sharing agreements with studios, keeping 32 of its 41 pre-petition locations moving forward.

In-Shape Holdings,¹²⁴ a California fitness chain, faced a slightly different scenario, where the court approved its \$45 million chapter 11 sale due to a lack of competing bids during the shutdown of all in-door gyms during the pandemic. Aquiline Capital Partners LLC, the stalking horse bidder, purchased In Shape's 49 clubs. Although the general unsecured creditors were unable to receive any payments from In-Shape's estate, they supported the transaction after extensive arm's length negotiations with the lender. Despite the termination of at least 21 locations and layoff of 3,000 workers, the judge commented that the bankruptcy process resulted in the highest and best sale price considering the circumstances. On a more positive note, 24 Hour Fitness,¹²⁵ another California fitness chain, was able to emerge from Ch. 11 bankruptcy with an optimized cost structure and elimination of over \$1.2 billion of funded debt. The company also worked to meet customers' needs during the pandemic by adding third-party content to its 24GO app, providing free on-demand workouts that are easy to do at home and facilitate workout reservation systems that comply with health agency guidelines.

III. Lease Negotiations During and After the Pandemic

a. Viewpoints Of The Opposing Sides

i. Debtors' Viewpoint

Within the context of retail restructurings, there is often an implicit or explicit tendency among debtors (or their professionals) to view the "real estate facing" aspect of the process as a zero sum game. Any rent concession left un-extracted is viewed as a fatal error, and a cudgel (and not a scalpel) is the tool of the trade. To a degree, this may be understandable—although perhaps inefficient in the long run. When a particular retailer begins to experience distress, let alone extreme distress, that same pressure is even more acutely felt in its existing lease portfolio. A portfolio oftentimes no longer reflects the realities of its existing market opportunities versus its business profile when leases were executed years (or decades) ago.

The retail debtor's operational restructuring may then hinge on its ability to restructure its operational footprint inasmuch as the debtor's overall leverage may also require substantial modification. Here, it must be noted that a retail debtor's ability to engage with its lessors outside of chapter 11 may itself be limited. In an example of the collective action problem at work, an individual landlord may have little to no incentive to voluntarily renegotiate a lease or forego rental income where a retailer requires broad based concessions from dozens, if not hundreds, of other landlords in order to avoid chapter 11. A landlord may then be unwilling to accept material concessions outside of chapter 11 where it understandably believes its tenant must take "another bite at the apple" through a subsequent chapter 11 filing. Substantive negotiations may therefore begin in earnest only after a chapter 11 has commenced.

¹¹⁹ See Warren Shoulberg, *Belk Becomes The In-And-Out Of Bankruptcy* (February 25, 2021), <https://www.forbes.com/sites/warrenshoulberg/2021/02/25/belk-becomes-the-in-and-out-of-bankruptcy/?sh=3b1b26663f1f>.

¹²⁰ See *Id.*

¹²¹ See also *In re Gold's Gym International, Inc.*, No. 20-31319 (Bankr. N.D. Tex. 2020); see also *In re Town Sports International, LLC*, No. 20-12168 (Bankr. D. Del. 2020).

¹²² See *In re Alamo Drafthouse Cinemas Holdings, LLC*, No. 21-10474 (MFW) (Bankr. D. Del. 2021).

¹²³ *In re Cinemex USA Real Estate Holdings Inc. et al.*, No. 20-14695 (LMI) (Bankr. S.D.Fla. 2020).

¹²⁴ *In re In-Shape Holdings, LLC, et al.*, No. 20-13130 (LSS) (Bankr. D. Del. 2020).

¹²⁵ *In re 24 Hour Fitness Worldwide, Inc., et al.*, No. 20-11558 (KBO) (Bankr. D. Del. 2020).

Time pressures imposed on the debtor in chapter 11 are severe. At the outset of the pandemic, section 365(d)(4) of the Bankruptcy Code provided the debtor 120 days, and up to 210 days,¹²⁶ to assume or reject its non-residential real property leases; subsequent extensions require the written consent of the affected landlord. And, as noted above, retail debtors are typically reluctant to assume leases “mid-case” and thereby require the payment of potentially substantial cure costs and risk the incurrence of substantial administrative expenses in the event of subsequent rejection.

The retail debtor faces substantial pressure to ‘move quickly,’ which can then result in aggressive or heavy-handed negotiation strategies. There is sometimes a tendency to view legitimate, commercial opposition by landlords as something amounting to a personal affront. Of course, this tendency both overlooks commercial realities and, more fundamentally, does not address the debtor’s business needs as section 365(d)(4)’s clock continues to tick away.

The time pressure imposed on the retail debtor has only been amplified in recent years by related trends in debtor-in-possession, or “DIP,” lending. The most ‘natural’ source of financing for a retail debtor in bankruptcy is oftentimes its existing, asset based, or “ABL,” lender. Typically, that lender will have a perfected, first priority lien on the debtor’s working capital, including cash, which means that such lender’s consent is necessary for the use of cash and related collateral or else a showing that such lender will be “adequately protected” for such use. Similarly, the incurrence of additional secured debt (such as from a party other than the incumbent ABL lender), generally speaking, requires the debtor to either obtain a similar consent or else make a similar showing of adequate protection.

In many instances, the ABL lender’s adequate protection will include so-called “case milestones” tied to the 120/210 timeline imposed by section 365(d)(4) of the Bankruptcy Code. That is, the ABL lender will be focused on ensuring that enough time exists to permit an orderly liquidation of inventory while the retail debtor’s store locations remain open (*i.e.*, well before expiration of that 120/210 day window) through “going out of business” or “GOB” sales if the debtor’s ultimate reorganization is doubtful. Such GOB sales can take weeks or longer. The case milestones imposed on the retail debtor will then accelerate the retail debtor’s window to reorganize by, in effect, forcing the debtor to commence GOB sales (and, by extension, begin the process of winding down operations as a going concern) well inside section 365’s nominal 120/210 day timeline. Further exacerbating the pressure on the retail debtor is that, in certain instances, the ABL lender may retain the right to take discretionary or formula-based reserves against availability, thereby increasing its pressure on a retail-debtor’s potentially precarious position.

At the risk of digression, consider whether such financing is worth the economic and non-economic cost (*e.g.*, case milestones) to the overall restructuring process. There are no categorical answers here. Such incremental financing is often vitally necessary for the retail debtor to, quite literally, keep its shelves stocked and its stores open—although, as noted above, the COVID trend of rent deferrals often meant that landlords were not (at least initially) the primary beneficiaries of DIP financing. Indeed, the retail debtor’s ability to keep its supply chain intact often relies heavily on its concurrent ability to demonstrate that its chapter 11 case is well-funded and that goods shipped will in fact be paid for. At the same time, onerous DIP terms, particularly case milestones, can (intentionally or not) force a retailer’s efforts to reorganize into a foregone conclusion—*i.e.*, a sort of GOB sale writ large that does nothing more than liquidate inventory for the principal, if not exclusive, benefit of the secured lender.

The combination of challenges imposed by section 365’s 120/210 window, a potentially shortened timeline imposed by the retail debtor’s related DIP financing, and a retail debtor’s perceived inability to ‘make progress’ on negotiations outside of chapter 11 can often drive a debtor into an adversarial relationship with its landlords from the outset. Viewed in the light most favorable to the retail debtor, this approach is understandable. Time is quite literally money, and the debtor’s survival as a going concern hangs in the balance.

However, the recent wave of COVID-related retail restructurings provides examples where retail debtors and their landlords were able to work constructively, collaboratively, and, indeed, creatively, where their interests aligned. That is, recent years have seen a number of restructuring transactions, either as a whole or in part, where retail debtors and their landlords were able to overcome the “zero sum game” mentality that can often impede a debtor’s prospects for survival. At the macro level, such examples include the landlord-sponsored reorganizations of businesses such as J.C. Penney, as noted above, which itself followed the playbook created by the landlord-led consortium that acquired Aéropostale chain in 2016.

Such creativity is not limited to change of control transactions. In this regard, the chapter 11 bankruptcy of 24Hour Fitness, the leading health club chain, provides an interesting example. 24Hour and certain of its affiliates

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As discussed above, this deadline has been temporarily extended to provide an initial 210-day period, with a further extension through 300 days if requested by a debtor.

commenced chapter 11 cases in June 2020¹²⁷ following the forced shutdown of substantially all of their fitness clubs in accordance with ‘shelter in place’ and similar governmental orders imposed in the wake of COVID in March 2020. 24Hour suspended all customer billing during this shutdown period. 24Hour was therefore generating effectively zero revenue for the significant majority of its chapter 11 cases and would be dependent on DIP financing for liquidity during this process.

Like many retailers in chapter 11 during the COVID period, 24Hour obtained a limited, 60-day deferral of its rental obligations over the objection of numerous landlords, while also signaling its willingness and need to pursue *force majeure* or similar litigation to defer or eliminate such rental obligations in their entirety. A significant group of 24Hour’s nearly 300 landlords sought relief in the form of requests for adequate protection in the form of rental payments, as well as seeking the right to surcharge collateral and undertaking broad-based opposition to 24Hour’s proposed DIP financing. Such a response was entirely understandable, as it cannot be forgotten that, particularly in the COVID-era, landlords faced their own, in many cases severe, pressures from their respective lenders and stakeholders. Thus, the 24Hour landlord community had very real business needs driving their approach.

Put another way, 24Hour and its landlords were facing a showdown that reflected the legitimate concerns and challenges faced by both sides but also threatened all parties in the sense by limiting access to a necessary liquidity lifeline.

Enter the solution. A working group of counsel representing certain of 24Hour’s landlords, together with 24Hour and its Unsecured Creditors Committee, developed a compromise position taking into account the unquestionably unique challenges at play. Namely, 24Hour’s DIP financing incorporated a mechanism by which, in relevant part:

- 24Hour would pay 30% of rent due on account of “Closed Clubs” (*i.e.*, clubs subject to a shutdown order) for the period of time commencing as of July 1, 2020;
- such “Closed Club Rent” would be funded into a segregated account for the benefit of affected landlords and paid on a monthly basis commencing August 2020;
- all settling parties agreed to a standstill on *force majeure* litigation through November 1, 2020;
- all settling parties reserved rights on *force majeure* and related issues—the goal being to address such issues through negotiation rather than litigation if at all reasonably possible; and
- permitted landlords to opt out of that settlement and pursue a separate path.

This novel approach balanced the debtor’s need for the proverbial (but vital) ‘breathing spell’ to stabilize its operations and, ultimately, develop a plan of reorganization that was ultimately consummated in late December 2021—notably, without 24Hour being required to undertake wholesale *force majeure* litigation. At the same time, this settlement compensated participating landlords, albeit not perfectly, for providing the debtor with the opportunity to take that necessary breathing spell along the way.

This is not to say that the balance of 24Hour’s restructuring process was characterized by unmitigated cooperation among the debtor and its landlords. Indeed, the resolution described above set the stage for hard-fought negotiations between 24Hour and its landlords around longer-term rent concessions. But this negotiation was able to play out in a process where parties could negotiate, on a commercial basis, without the sword of litigation hanging over them.

This is not to say that 24Hour presents a “one size fits all” solution to landlord/retailer engagement. For example, such a solution would have been entirely unlikely if 24Hour’s landlords lacked confidence in its long-term survival. But 24Hour demonstrates the extent to which creative structuring can avoid the zero sum game mentality that can otherwise disrupt parties’ ability to reach a shared goal.

ii. Landlords’ Viewpoint

During the pandemic, landlords received an onslaught of rent relief requests from retail tenants across the board, usually delivered by real estate advisors, for stores slated for closure and rejection or “on the bubble”.

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In re 24 Hour Fitness Worldwide, Inc., No. 20-11558 (KBO) (Bankr. D. Del. 2020).

However, because of the unparalleled effects of the pandemic, landlords often received requests even for those stores that had been performing well.

(a) Lease Negotiations During a Normal Year

Year-to-year, market corrections are always needed for commercial leases in certain sectors. In a normal year, before deciding whether to grant rent relief, landlords would consider: (i) whether or not the store is profitable and its recent sales trends; (ii) the value of the store in the shopping center; (iii) whether the debtor would reject the lease if the request is denied; (iv) whether a replacement tenant would be easy to find; and (v) co-tenancy issues if the spaces goes dark.

From a landlord's perspective, the purpose of a lease amendment with a chapter 11 debtor or distressed tenant is to provide an accommodation to retain and keep the tenant in business at the premises, not create a more valuable lease for assignment to a third party. A landlord considering a debtor's request for rent relief should always negotiate for certain protections in exchange, including:

- Lease Disposition: Assumption of the immediately upon execution of rent relief agreement. Voiding of agreement if lease is assigned or rejected, plus return to full rent and an allowed administrative claim for any rent relief already taken prior to disposition of lease.
- Timing of Rent Relief: Concessions should commence upon assumption of lease. If parties agree to retroactive rent relief, upon assumption, any overpayment of rent may be credited first against cure amount due to landlord and then against future rent.
- Type of Rent Relief: Deferral, instead of reduction, of rent. Or rent reduction for a limited duration.
- Cure of Defaults: It is in both parties' best interests to quantify the amounts due for cure and pecuniary loss and to provide for prompt payment after assumption. This avoids unnecessary delay and litigation later.
- Lease Obligations During Bankruptcy Case: Tenant should timely comply with all lease requirements, including payment of rent. If monetary or non-monetary default occurs and is not cured, amendment should be null and void.
- Post-Assumption Lease Obligations: Tenant should continue to be responsible for year-end reconciliations and indemnification obligations as they come due in the ordinary course of business and to honor any obligation to indemnify landlord.
- Multiple Leases: If landlord is party to more than one lease with tenant, rent relief should be conditioned on all leases being assumed.
- Court Approval: Necessary to ensure that the modified terms are enforceable upon a debtor's breach and are not considered restrictions on assignment.

(b) The Impact of the Pandemic on Lease Negotiations

From 2020 to 2021, compounding the needed market corrections were numerous uncertainties: (i) whether and when the pandemic would subside; (ii) how long it would take to develop a vaccine, in addition to its effectiveness and whether people would take it; (iii) the interest of the general public in returning to pre-pandemic retail habits and activities; (iv) whether spending would return to pre-pandemic levels, especially in light of the substantial increase in unemployment; and (v) the resilience of the overall economy at large.

Facing these various uncertainties, landlords scrambled to analyze rent relief requests and determine a manageable response that would allow them to continue meeting their ongoing debt and operational obligations. Some were less successful than others, as in the cases of CBL and Washington Prime Group. Based on informal surveys of numerous bankruptcy professionals, overall landlords responded very favorably to the tenant requests. Collaboration and compromise were key during the pandemic. According to some real estate advisors in many cases as many as eighty percent of the leases target for amendment were successfully restructured with Landlords agreeing to combinations of rent deferrals, abatements and percentage rent deals. In many situations, the parties agreed to short-term deals because of the significant unknowns. In some cases landlords were able to obtain unilateral termination rights, which may provide significant value as market conditions improve.

Overall, it appears that, during the pandemic, landlords and tenants reached a balanced approach through lease modifications that either deferred or abated certain rent due during the government-mandated closures, modified rent due in the short term such that landlords and tenants partially shared the risk of a delay in retail spending returning to pre-pandemic levels, and shortened lease terms or added termination rights that provided flexibility for certain parties to pivot to other possibilities in the future as needed.

(c) The Future of Lease Negotiations

While we saw a glut of retail chapter 11 filings and lease modifications in 2020, the number of filings has drastically dropped off in 2021. Problems in 2021 have revolved largely around office leases due to the large majority of the United States workforce working remotely. Anecdotally, all veteran bankruptcy professionals questioned admit that mid 2021 is the quietest time for retail filings in at least 30 years. How long will it last? Suppressed demand caused sales to skyrocket as government-mandated closures were lifted. Government stipend programs increased savings rates in 2020, but it is not clear if those funds will now be turned into disposable income in 2021 and 2022. Rent deferrals are starting to come due and for now, retailers have the funds to honor those obligations. But what happens when consumer demand levels off and payrolls increase as retail companies are forced to compete with Amazon's increased wages? Many companies have taken on significant debt that will mature in 2023, 2024 and 2025. When will the next onslaught of filings begin?

The big question is whether the trends that we saw as a result of the pandemic will continue into the future. As the respective negotiating positions of landlords and tenants continue shifting due to macroeconomic forces, it remains to be seen whether collaboration will continue and which party will end up with greater leverage in 2022 and beyond. Regardless, tenants will continue to request rent relief and parties will continue to negotiate lease modification agreements.

IV. Conclusion – Looking Back and Forward

Looking back over the past 18 months, in the face of extraordinary circumstances and tremendous uncertainty, the bankruptcy system once again provides a forum and opportunity for all stakeholders in the retail sector - management, lenders, landlords and others, to enable as many retail companies as possible to succeed post-pandemic.

At the outset of the pandemic as economic activity came to a virtual standstill, companies put protective health measures in place and transitioned as much of their operations as possible to remote work from home. Amidst the crisis, bankruptcy courts embraced video hearings. Professionals on behalf of all stake holders, management, retail employees, elected officials, government employees and particularly the members of the bankruptcy court system worked literally around the clock to help hundreds of retail companies withstand the unprecedented circumstances presented by the Covid-19 related shutdown. It was an impressive, often painful effort, that for many unfolded in the midst of terrible tragedy, but undoubtedly positioned countless retail companies to continue to meet the ever changing consumer demands in this constantly evolving economy.

A healthy economy has usually been accompanied by a steady flow of retail companies utilizing the chapter 11 process to reorganize, transfer going concern ownership or liquidate. So, what does the current lull in bankruptcy filings mean and how long will it last? Informal polling suggests that the remainder of 2021 will remain very quiet in the restructuring community. Most likely, this is a temporary pause as the pendulum of consumer demand and access to capital continues to swing widely. Eventually the afterglow of emergence from the dark days of 2020 will give way to longer-term trends (including increased competition from e-commerce and a continuing movement away from enclosed regional malls). Ultimately, as the pace of societal change and technological innovation continues to accelerate, so too will the need for retail companies to compete, evolve and often reorganize.