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Bankruptcy Experts: More Pain and Uncertainty Coming

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A record number of business bankruptcies have been filed in Texas in 2020 and there is much more carnage to come, especially in the world of real estate, retail and midstream energy, according to a panel of leading corporate bankruptcy and restructuring experts.

Even more important and worrisome, according to the panelists, is that the business restructuring cases are going to get increasingly difficult to resolve in a positive manner and that many companies seeking to reorganize will be forced to liquidate instead.

“There’s still a lot more to come,” John Higgins, a bankruptcy partner at Porter Hedges, said at a CLE webcast Friday. “There are still a lot of large cases [in the pipeline]. It will be interesting to see what happens to retail once we get through the holiday season. It will be interesting to see what happens to real estate.”

“I don’t think we are completely through the cycle on energy,” said Higgins, pointing to oil and gas service companies and offshore drillers in the current trend of new bankruptcies. “Unfortunately, we have some pain to go. Things have changed and some of this is not going to go back to where it was before.”

Higgins was part of a panel of bankruptcy experts that included Chief Bankruptcy Judge David Jones of Houston and Jackson Walker bankruptcy partner Matt Cavanaugh. Shell Bankruptcy Litigation Senior Counsel Travis Torrence moderated the 90-minute program that discussed corporate bankruptcy and restructuring trends and developments in Texas and the panelists’ expectations for the next few months ahead.

Spoiler alert: It is not good.

Chief Judge Jones, who implemented the bankruptcy court reforms in the Southern District that has made Houston one of the most popular jurisdictions for Chapter 11 filings in 2020, predicted tough times ahead for businesses and individuals.

“There are a ton of things that are sitting out there,” Judge Jones told the 200 corporate in-house counsel, investment bankers and business lawyers who attended the Texas Lawbook CLE webcast. “There are an awful lot of forbearances out there with no resolution on the horizon.”

“I think the cases are going to get harder,” Judge Jones said. “We’ve seen a lot of cases filed where we have a pie and we just need to rearrange the pie and give everybody a different slice. A lot of

cases are now a cupcake and people at the table expect a pie. There’s going to be a very different approach to a lot of these cases.”

Judge Jones said many companies will go into Chapter 11 seeking to restructure but will end up having to liquidate. He said it will require creativity to come up with new solutions in 2021 and 2022.

“There are huge issues in the mid-market that we haven’t seen yet,” he said. “I don’t know what those are going to look like. I don’t know if things can be saved. There’s a lot of uncertainty.”

“I take it as a personal loss when a Chapter 11 has to liquidate,” he said. “I always want to go the extra mile if I can preserve a job or prevent, for example, a building from being shuttered because it has a negative effect on society as a whole.”

Judge Jones said a case he handled as a younger lawyer influences how he handles the tough cases today. He represented the bankruptcy trustee who had taken over a series of hotels, many of which had been shuttered.

“The first time I went out to inspect the property and take pictures as I always did, I was wearing my new Men’s Warehouse suit, and I tripped and fell,” he said. “I tore my new suit and I got up and realized that I tripped over a dead body.”

“The implications that has in the community is something that I have never ever forgotten,” Judge Jones said. “I do what I can [to not let] that happen to any community. It is never a positive.”

Cavanaugh, who represents debtors in the bankruptcy cases involving Chesapeake Energy, J.C. Penney and Neiman Marcus, said most retail companies that filed in 2020 were already on the path to Chapter 11 when Covid-19 hit.

“The timing [of those retailer’s filing bankruptcy] was moved up because of the pandemic,” he said. “We’ve had a couple REITs [real estate investment trusts] file in the Southern District and that is new. On Monday night, we had a foreclosure induced bankruptcy.”

Cavanaugh predicted there will be more bankruptcies in the oil patch.

“We haven’t seen a ton of midstream restructurings and those may be on the horizon,” said Cavanaugh, who also represents London-based Seadrill Partners, an oilfield services operation that filed for bankruptcy

The Texas Lawbook

protection in Houston Dec. 1. Kirkland & Ellis also represents Seadrill.

Judge Jones said he doesn't understand the impact of governmental influences on evictions, mortgage foreclosures.

"My consumer docket has been a predictor of what is going to happen corporately," he said. "Consumers have less elasticity to withstand economic shock. The consumer docket right now makes no sense."

Judge Jones said that his bankruptcy consumer docket has actually declined.

"There aren't evictions. There aren't foreclosures. There aren't repossessions. And that is pent up," he said. "Has there been so much deferral that it can't be fixed? Are we going to see legislation that deals with what I will call COVID debt?"

"We just don't know, but it is going to get interesting," he said.

Judge Jones offered a major tip to leaders at corporate law firms.

"If you have young lawyers at your firm and you want them to understand the impact of what they do, have them sit through a Chapter 13 panel," he said. "You cannot come out of one of those without being moved."

Judge Jones said that watching Chapter 13 proceedings helps lawyers understand the role they play and "why you have to get it right."

Nearly 200 corporate in-house counsel, investment bankers and business lawyers attended the CLE webcast.