

May 18, 2020

Update on COVID-19 Impacts on Landlords of Retail Debtors

As we explained in our [memo](#) last month, the severe financial pressures on retailers resulting from the COVID-19 pandemic have led to unprecedented rulings affecting the rights of commercial landlords in chapter 11 cases. In particular, we noted that one of the Bankruptcy Code's core protections for landlords, the requirement that debtors make current payments of rent (subject to one 60-day extension) on their commercial leases, had been overridden in some recent retail bankruptcies.

Since our previous memo, the bankruptcy court in the *Pier 1* case has issued a decision explaining its ruling relieving the debtor of its obligation to pay rent on a current basis. The court explained that the pandemic had made it impossible for the debtor to generate any revenues, even from liquidation sales, and that severe cost-reduction measures were required to preserve value for all stakeholders. It held that, despite the statutory requirement to pay rent on commercial leases, the Bankruptcy Code provides no remedy for a debtor's failure to make such payments, and it would not require the debtor to allocate its scarce resources to the payment of landlords, alone among all of its creditors. Rather, the court held that, like other post-petition creditors providing goods and services to debtors, the landlords were entitled only to an administrative claim for unpaid rent. The court also offered debtors a potential roadmap for objecting to such claims, noting that it had not yet decided "whether the government-mandated closures constitute a taking sufficient to merit the non-payment of rent," or whether performance might be "excused due to impossibility, impracticability, or frustration of purpose."

The court in the *Modell's* case has recently granted relief similar to that approved in *Pier 1*, and several other debtors whose businesses are dependent on in-person consumers have asked to be able to defer their rent beyond the first 60 days, including J. Crew, True Religion, Cinemex, and Stage Stores. In light of the steep declines in retail sales (reported to be 16.4% for April in May 15's *New York Times*), it can be expected that more requests for rent relief in bankruptcy are likely to come.

The *Pier 1* decision runs counter to the general understanding that the Bankruptcy Code compels a debtor to pay its landlords on a current basis, unlike other post-petition creditors. It attempts to address today's unprecedented situation, where debtors are unable to utilize their stores even to conduct going-out-of-business sales yet would be required to pay landlords, to the detriment of every other constituency. The decision, which is currently on appeal, will have a significant impact on debtors' ability to reorganize in these trying circumstances and whether landlords will have no alternative but to serve as involuntary financers of their tenants' bankruptcy cases.

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