



Professional Perspective

U.S. Bankruptcy Court Relief Amid Covid-19

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In response to the coronavirus pandemic, U.S. bankruptcy courts have implemented procedures to allow the ongoing—albeit virtual—administration of bankruptcy cases.

Electronic Operations and Administrative Relief

Many U.S. bankruptcy courts have long operated in a semi-virtual environment, accommodating remote appearances and electronic filings pre-crisis. This trend has continued as many bankruptcy courts have continued to expand technology use to ensure judicial access during the crisis. While bankruptcy courts cannot undo the macroeconomic impact of Covid-19, the courts are implementing measures to facilitate the administration of bankruptcy cases by using electronic means to conduct hearings and meetings, submit evidence, examine witnesses, and generally administer cases.

Procedural Measures

Certain procedural measures allow the bankruptcy courts to apply limited resources where they are most needed—by postponing non-urgent hearings and, in some cases, ordering the automatic extension of court-imposed deadlines during the pandemic.

Postponements

To help stop the spread of Covid-19, and to conduct a triage of their limited resources, some federal courts, including bankruptcy courts, have temporarily stayed nonessential trials, hearings, and conferences. A federal court in Florida entered an order to extend discovery deadlines notwithstanding objections. It cited “the present difficulties of working remotely with limited staff and resources against the Covid-19 backdrop,” and recognized that it was appropriate in that case to extend deadlines given that “a national emergency has been declared by President Trump, the State of New York has been particularly crippled by the outbreak, and courts and other workforces across the nation are stretched thin.” *Kleiman v. Wright*, No. 18-cv-80176, Dkt. No. 441 at 3 (S.D. Fla. Mar. 26, 2020).

Note that not all courts have permitted delays, especially where the court views a party as using the pandemic as a pretext for continued inaction. For instance, a debtor in the Southern District of New York had appealed a decision of the bankruptcy court to the district court nearly a year ago but cited Covid-19 difficulties in seeking an extension to prosecute the appeal. Although the district court acknowledged it had granted every other Covid-19-based request for an extension or teleconference, it condemned the debtor’s attempt to justify its “lengthy, repeated and [nearly yearlong]” failures on Covid-19. *Koch v. Preuss*, No. 19-CV-2830, 2020 U.S. Dist. LEXIS 46998 (S.D.N.Y. Mar. 18, 2020).

Tolling All Court-Imposed Deadlines

The U.S. Bankruptcy Court for the Southern District of Texas has entered a general order that tolls all court-imposed deadlines imposed by the Federal Rules of Bankruptcy Procedure and/or the local rules by the number of days that the court’s Covid-19 protocols are in place. The tolling is subject to case-by-case modification, and parties may move to have such tolling eliminated or amended. For practitioners, the automatic extension is flexible in allowing requests for urgent matters to continue unabated; for the courts, it promotes judicial efficiency by avoiding a barrage of extension motions and matching judicial supply to case demand.

Alternate Judges

To further promote judicial efficiency and effective triage of bankruptcy matters during the Covid-19 pandemic, some bankruptcy jurisdictions are allowing “judge swapping” as may be needed for the administration of the case, notwithstanding case assignments. While alternating judges may not be efficient in a certain cases where decisions require extensive background information, such flexibility is apt for many disputes—particularly where an issue may be decided as a matter of law.

Original Signatures

Whereas bankruptcy courts require wet signatures for certain documents, particularly for certain debtor filings, some courts are now permitting the use of electronic signatures for such filings and expanding the scope of permitted electronic signing technology (such as DocuSign) that maintains an audit trail. Such technology allows the filing attorney to obtain the identification of the signer's computer or device from the commercial provider and otherwise complies with the requirements of the U.S. E-Sign Act.

Adjusted Requirements

Bankruptcy courts are adjusting to stay-at-home orders and social distancing requirements by increasing the use of technology in hearings, trials, and motion practice.

Telephonic and Video Hearings, and Evidence Protocols

Many bankruptcy courts were already proficient in conducting telephonic hearings or allowing optional telephonic appearances for in-person hearings. In response to the pandemic, such courts have expanded virtual offerings and now (temporarily) require telephonic and/or video appearances.

Where parties must submit evidence, courts have either established protocols or announced that judges will create protocols with the parties on an ad hoc basis. For example, some courts require parties to submit evidence in advance of trial by electronic filing via ECF. Advance electronic submission of evidence provides timely access for all parties—and still allows parties to print hard copies in advance of appearing virtually.

Witness Examination Protocols

While protocols may vary by jurisdiction, the Southern District of Texas has long used relatively advanced telecommunications protocols in hearings, and has now established (temporary) procedures requiring witnesses to appear by audio and video connection (including the use of a phone or other video device) via the Join.me website, allowing the court to administer the oath over audio connection, and allowing parties in interest to present documents in connection with examination via the Join.me website.

Recording Telephonic Hearings, Conferences, and Trials

In order to create and maintain official records of proceedings during the pandemic, some bankruptcy courts are allowing court personnel to make recordings using the applicable teleconference technology—and making such recordings part of the official record.

Conducting Section 341 Meetings

The United States trustee appointed in a bankruptcy case presides over a Section 341 meeting during which the trustee and creditors may question the debtor under oath regarding its assets, liabilities, and other matters pertaining to the case. These meetings are held outside of court (and without a judge present) in conference rooms selected by the trustee. As with in-court hearings, bankruptcy courts are allowing the use of secure technology to facilitate compliance with Section 341 while avoiding transmission of the virus through in-person meetings.

Technological solutions are sometimes imperfect, subject to glitches and practitioner learning curves that tend to cause moderate delays. The slight inconvenience of such delays is heavily outweighed by ongoing access to the bankruptcy court system during a period of financial distress.

Digital Pandemic Bankruptcy

Bankruptcy courts and the Bankruptcy Code already provide a means for debtors and creditors to effectively pursue in-court reorganization or liquidation. However, in light of the added burden of the Covid-19 pandemic on distressed businesses and debtors, bankruptcy courts continue to implement the tools available to them to improve the process and offer relief as may be justified—without Congress, to date, amending the Bankruptcy Code to provide additional relief for large businesses in bankruptcy.

Insolvency practitioners will be well-advised to consider both the opportunities and the obligations that these changes create. Prudent bankruptcy lawyers will keep abreast of evolving standing orders in their respective jurisdictions and consider the implications for their clients. If a bankruptcy court requires electronic submission of evidence prior to trial, lawyers will need to allow adequate lead-time and procure needed technology (and IT support) to ensure proper and timely submissions.

Moreover, parties will likely benefit from increased communications concerning pending cases and upcoming hearings. More than ever, courts will undoubtedly appreciate parties contributing to judicial efficiency by determining which matters can be deferred without unfair prejudice and entering into stipulations to streamline or avoid hearings where possible.

In addition to being aware of Covid-19 for optimal representation in pending bankruptcy cases, bankruptcy advisers considering different jurisdictions in bankruptcy planning will be wise to consider the relative technological capabilities and accommodations offered and the effect they may have on case efficiency, especially where liquidity is extremely tight—a familiar narrative during the pandemic.