



AMERICAN
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Bankruptcy Time Travel: Can Debtors Obtain Nunc Pro Tunc Relief and Delay Post-Petition Rent Payments into the Future (Pending the Pandemic and Beyond)?

Presented by the Business Reorganization
and Bankruptcy Litigation Committees

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Bankruptcy Time Travel:

Can Debtors Obtain *Nunc Pro Tunc* Relief and Delay Post-Petition Rent Payments into the Future (Pending the Pandemic and Beyond)?

BEFORE WE GET STARTED

Q&As

- Submit questions by using the Q&A feature on the bottom of your screen.
- We will answer your questions, time permitting.
- If your question is not answered during the presentation, we will reach out directly after the presentation.

Today we'll address the following topics:

Rent Deferral Motions

Acevedo/Nunc Pro Tunc Issues

RENT DEFERRAL MOTIONS

Statutory Predicates:

11 U.S.C. Section 305 states that the Court can suspend all proceedings in a case, at any time, if it serves the interests of the creditors and the debtor.

11 U.S.C. Section 365(d)(3) requires that the debtor timely perform its obligations under unexpired leases arising from and after entry of an order for relief, until the lease is assumed or rejected. *However*, the Court may extend, for cause, the time for performance of any such obligation that arises within 60 days of the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period.

11 U.S.C. Section 105(a) permits the Court to issue any order or judgment necessary or appropriate to carry out the provisions of this title.

Rent Deferral Motions

- **Modell's Sporting Goods, Inc.** filed for Bankruptcy on March 11, 2020, in New Jersey. The case was a liquidating 11. On March 23, 2020, Modell's motion was filed pursuant to section 305(a) and section 105.¹ Therein, the debtors committed to pay wages and insurance during the requested 60-day suspension.
- The New Jersey Bankruptcy Court granted an initial 30-day deferral relying on the unforeseen circumstances presented by the COVID-19 pandemic and related shutdowns.²
- In April, the debtors sought an additional 30-day deferral, as the store-closing sales still could not get underway. The contractual remedies of frustration of purpose and intervening impossibility were argued.
- Multiple extensions, beyond the 60 days permitted in section 365(d)(3) were ultimately granted to the debtors.³

¹ *In re Modell's Sporting Goods, Inc.*, Case No. 20-14179 [Docket No. 115] (Bankr. D.N.J. March 23, 2020).

² *Id.* [Docket No. 166].

³ *Id.* [Docket Nos. 294, 371].

Rent Deferral Motions

- **Pier 1 Imports, Inc.** filed for bankruptcy on February 17, 2020 in the Eastern District of Virginia. The case was filed with a few possible outcomes: reorg/restructure; sale of a going concern; or liquidation. The timing of the pandemic and a sale effort that didn't come together doomed the enterprise.
- On March 31st, Pier 1 sought emergency relief pursuant to section 105(a), the Court's equitable powers, frustration of purpose, the doctrine of impossibility, etc.⁴ On the date the motion was filed, the debtors were already 43 days into the 60 days that would be permitted by section 365.
- During an April 2nd hearing, the Bankruptcy Court granted an extension through and including April 28th, leaving the door open for additional relief, if cause could be shown.⁵ No adequate protection was granted to the landlords beyond a budget showing available funds.

⁴ *In re Pier 1 Imports Inc.*, Case No. 20-30805 [Docket No. 438] (Bankr. E.D. Va. Mar. 21, 2020).

⁵ *Id.* [Docket No. 493].

Rent Deferral Motions

Pier 1 (con't)

- The relief granted included barring creditors from making emergency requests for payment between the order and April 28th, delaying a hearing on any requests for payment until 45 days after the expiration of any suspension order, and suspending the debtors' obligation to make rental payments through at least April 28th.
- In finding that the deferred rent would have administrative priority, following its prior Circuit City ruling,⁶ section 365(d)(3)'s 60-day limitation was not offended.
- Prior to the April 28 hearing, the debtors requested a further suspension through and including May 28th.
- The Bankruptcy Court granted the requested relief through and including May 29th.⁷
- On May 29th, the debtors made plain that the case had shifted to liquidation mode, for certain and began to reopen to conduct store closing sales.
- Those sales were scheduled to be finally concluded on or before 10/31.

⁶ *In re Circuit City Stores, Inc.*, 447 B.R. 475 (E.D. Va. Bankr. 2009).

⁷ *Id.* [Docket No. 637].

Rent Deferral Motions

- **Chinos Holdings, Inc.** (J.Crew) filed for bankruptcy on May 4, 2020, in the Eastern District of Virginia, in a state of partial reopening.
- Rent deferral was requested with the first day filings,⁸ but the hearing was deferred to May 21st and then again to May 26th.
- The Order entered granting the relief on May 26th cited *Pier 1* as its authority and permitted the Debtors through July 6th to pay rent.⁹ This was an extension through the 63rd day of the case.

⁸ *In re Chinos Holdings, Inc.*, Case No. 20-32181 (Bankr. E.D. Va. May 4, 2020) [Docket No. 23].

⁹ *Id.* [Docket No. 323].

Rent Deferral Motions

- **Stage Stores, Inc.** filed for bankruptcy on May 10, 2020 in the Southern District of Texas. On May 11, 2020, the debtors filed an emergency motion to defer payment of certain lease obligations,¹⁰ which was only heard on May 27th.¹¹
 - The order held that, for stores that were closed on the petition date, rent could be deferred until the earlier of a) the date on which the store reopens or b) a period of 60 days from the petition date.
 - The Court opened the courthouse doors to adjudicate pre-petition and post-petition defaults and concerns over non-payment.

¹⁰ *In re Stage Stores, Inc.*, Case No. 20-32654 (Bankr. S.D. Tex. May 11, 2020) [Docket No. 22].

¹¹ *Id.* [Docket No. 337].

Rent Deferral Motions

- **J.C. Penney** filed on May 15, 2020, in the Southern District of Texas. At the time of their filing 474 stores were open and another 340 were scheduled to be open in a matter of weeks. The debtors' deferral motion was filed on May 28th.
- The debtors emphasized that granting the related relief would help obtain rent concessions from landlords.¹² It is worth noting that, at the time the debtors filed their motion, they had \$554 million in cash.
- On June 11th, the Court granted the debtors' request through and including July 13th (the 60th post-petition day) pursuant to the limitations of section 365(d)(3).¹³

¹² *In re J.C. Penney, Inc.*, Case No. 20-20182 (Bankr. S.D. Tex. May 28, 2020) [Docket No. 338].

¹³ *Id.* [Docket No. 721].

Rent Deferral Motions

- **24 Hour Fitness Worldwide, Inc.** filed on June 15, 2020, in Delaware. The debtors filed their rent deferral motion on June 16.¹⁴ The hearing was set for June 29th.
- 235 locations were open at the time the motion was filed, but another 75 remained closed. Landlords had already endured months of unpaid pre-petition rent, at the time the request was made.
- The request was granted, and then extended. The debtors' request left the courthouse doors open for relief from stay and related relief requests.¹⁵
 - When the original order was extended, parties were allowed to opt in or opt out of a partial payment protocol: if the location is open, rent is paid. If a government order is keeping the location closed, partial payment. If the debtor is choosing to close the location, rent is paid.
- Partial payments took the pressure off of the landlords. This restored equilibrium: covering costs, periodic payments, subject to reconciliation, changed the entire case.

¹⁴ *In re 24 Hour Fitness Worldwide, Inc.*, Case No. 20-11558 (Bankr. D. Del. June 16, 2020) [Docket No. 132].

¹⁵ *Id.* [Docket No. 407].

Rent Deferral Motions

- **CEC Entertainment, Inc. (Chuck E. Cheese)** filed for bankruptcy in the Southern District of Texas, on June 25, 2020. On the 28th of June, the debtors filed their emergency motion to extend the time to perform certain lease obligations.¹⁶ The matter was heard on less than 24 hours notice and the debtors' request was granted on an interim basis.
- Landlords have no access to the Courts short of emergencies.
- Upon expiration of the deferral period all rent comes due and must be paid.
 - The interim order left room for compromises.
 - A more fulsome hearing was conducted on a non-emergency basis.
 - This allowed for more the Court to get status and make decisions as the case unfolded.
- After the 2nd hearing the Court confirms the initial 60 day extension.

¹⁶ *In re CEC Entertainment, Inc.*, Case No. 20-33163 [Docket No. 163].

Rent Deferral Motions

- **CEC (Con't)**
- Within 4 hours of the second extension hearing, the debtors filed a motion to abate rent at 100 locations in 7 states where things are still closed by gov't restrictions.¹⁷ This motion sought complete abatement of rent to pre-petition times.
- The result of that motion was an agreement to a partial-payment protocol to stop the abatement OR the parties had the option to litigate the issue.
 - In some cases the issue is still being litigated.
- Consider also *RTI Holding Company, LLC (Ruby Tuesday)*, Case No. 20-12456, filed October 7, 2020.

¹⁷ *Id.* [Docket No. 487].

Rent Deferral Motions

- **Ascena Retail Group, Inc. (Ann Taylor)** filed for Bankruptcy on July 23, 2020.
- The debtors filed their rent deferral motion on July 31st, requesting a hearing on August 20th.
- The hearing was continued by the Debtors to August 26th and then again to September 3rd.
- The matter was never heard on September 3rd as the debtors and the committee struck a global deal, agreeing to defer rent through and including September 18th.¹⁸ Checks were cut on the 18th.

¹⁸ *In re Ascena Retail Group, Inc.*, Case No. 20-33113 [Docket No. 587, Annex 6] (Bankr. E.D. Va. September 10, 2020).

Rent Deferral Motions

- *See also:*
- *In re Forever 21, Inc.*, Case no. 19-12122 (Bankr. D. Del. Apr. 21, 2020) (the purchaser of the debtors' assets cannot seek rent deferral protection in the seller's bankruptcy case—no jurisdiction).
- *In re Circuit City, Inc.*, 447 B.R. 475 (Bankr. E.D. Va. 2009) (opinion originally stood for the proposition that stub rent could be paid with other administrative priority claims; more recent interpretations of this opinion call for any administrative rent can be paid with other administrative priority claims).

Rent Deferral Motions

Timing:

Filing Date/Request for Deferral

- Pier 1-- February 17th/March 31st
 - Modells--March 11th/March 23rd
 - Chinos-- May 4th/May 4th
 - Stage Stores-- May 10th/May 11th
 - J.C. Penney-- May 15th/May 28th
 - 24 Hour Fitness-- June 15th/June 16th
 - Chuck E. Cheese-- June 25th/June 28th
 - Ascena-- July 23rd/July 31st
- How did these requests change over time?

Rent Deferral Motions

Related:

- What about pre-petition rent relief requests?
- Did granting such requests have any impact once the bankruptcy was filed?

Rent Deferral Motions-FINAL THOUGHTS

A few final thoughts on this subject:

Did anyone ever use sections 305 or 365(d)(3) like this before COVID?

Should deferral motions be considered on an expedited basis?

Did the relief really help the Debtors?

Acevedo and *nunc pro tunc* requests

Roman Catholic Archdiocese of San Juan v. Acevedo, 140 S.Ct. 696 (2020).

Chronology is important to understanding the holding:

- Plaintiffs sued in local court in PR.
 - Trial court declined to issue a PI that would have compelled the defendants to pay certain retirement benefits.
 - PR Supreme Court reversed. Case was remanded to trial court (for a determination of which defendant or defendants had to pay the benefits).
 - Civil action removed the case to U.S. district court. Removal was predicated on the chapter 11 case of one of the defendants.
 - Chapter 11 case dismissed.
 - On remand from the PR Supreme Court, trial court ordered two defendants to make payments. A second order from the trial court ordered a defendant to deposit a substantial amount with the court within 24 hours. On the next day, the trial court issued a third order, this one requiring the sheriff to seize certain property of the defendants. These are the "payment and seizure" orders.
 - Civil action remanded, by the U.S. district court, to local courts of PR. This is the key aspect: the remand order specified that the case was remanded "effective as of" the date of the dismissal of the chapter 11 case. In other words, the U.S. District court was attempting to remand the case to the local courts effective as of a date that preceded the issuance of the payment and seizure orders.
 - PR Supreme Court upheld the payment and seizure orders.
- One of the defendants sought a writ of certiorari from SCOTUS.

Acevedo Analysis

Although the SCOTUS granted the cert petition, it vacated the judgment of the PR Supreme Court. It did this because the PR trial court lacked jurisdiction to issue the payment and seizure orders. When those orders were issued, the case had been removed to federal court and had not been remanded. As a result, the local court lacked jurisdiction to issue the orders (or any others) in the case.

Acevedo Analysis

- The district court's attempt to remand "retroactively" was not effective. Here's what the SCOTUS said about the attempt:
- Federal courts may issue nunc pro tunc orders, or "now for then" orders, Black's Law Dictionary, at 1287, to "reflect the reality" of what has already occurred, [Missouri v. Jenkins, 495 U.S. 33, 49, 110 S.Ct. 1651, 109 L.Ed.2d 31 \(1990\)](#). "Such a decree presupposes a decree allowed, or ordered, but not entered, through inadvertence of the court." [Cuebas y Arredondo v. Cuebas y Arredondo, 223 U.S. 376, 390, 32 S.Ct. 277, 56 L.Ed. 476 \(1912\)](#).
- Put colorfully, "[n]unc pro tunc orders are not some Orwellian vehicle for revisionist history—creating 'facts' that never occurred in fact." [United States v. Gillespie, 666 F.Supp. 1137, 1139 \(ND Ill. 1987\)](#). Put plainly, the court "cannot make the record what it is not." [Jenkins, 495 U.S. at 49, 110 S.Ct. 1651](#).
- Nothing occurred in the District Court case on March 13, 2018. See Order Granting Motion to Remand in No. 3:18-cv-01060 (noting, on August 20, 2018, that the motion is "hereby" granted and ordering judgment "accordingly"). March 13 was when the Bankruptcy Court dismissed the Trust's proceeding and thus the day that the Archdiocese's argument for federal jurisdiction lost its persuasive force. Even so, the case remained in federal court until that court, on August 20, reached a decision about the motion to remand that was pending before it. The Court of First Instance's actions in the interim, including the payment and seizure orders, are void.

Acevdeo Analysis

Bankruptcy implications?

- Orders authorizing retention of professionals?
- Orders authorizing the rejection of leases and contracts?
 - *In re Donghia, Inc.*, 2020 Bankr. LEXIS 1254 (Bankr. D. Ct., May 12, 2020).
 - *True Religion Apparel, Inc.* (Bankr. D. Del. May 6, 2020).
 - *G-Star Raw Retail, Inc.* (Bankr. C.D. Ca. July 2020).
- Orders annulling the automatic stay?
- Other implications?