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Bankruptcy Slowdown Prompts Lawyers to Pivot to Transactions and Litigation

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The attorneys feel Q4 and early 2022 will host a bankruptcy boom as government money runs out and eviction moratoriums end. Until then, most have found adjacent practices that do well when bankruptcy is down.

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The past year has been tough for bankruptcy lawyers.

This June saw 34,248 filings across all chapters — the fewest number of June filings since 2006, according to Epiq Global's AACER bankruptcy information service. By comparison, total filings were above 42,000 in June 2020 and 61,000 in June 2019.

Total bankruptcy filings and consumer bankruptcy filings were both down 27% for the first half of the year compared to the same period last year, and total commercial filings during the same periods dropped by 30%. Monthly commercial filings were also down by 27% in June compared with June 2020, and down 36% compared with June 2019.

Compared to May, however, these numbers are largely up. Last month also saw a modest increase in commercial bankruptcies, up 11% over May, with commercial chapter 11 filings up 42%. Total filings remained flat, with a dip of only 498, or 1.4%.

South Florida, in particular, seems to be on the rise. Florida Southern Bankruptcy Court saw more commercial bankruptcy filings in June than it has since last October, at 66 — which is also the highest number of commercial filings the court has had in the month of June since at least 2012.

The six attorneys we spoke with largely agreed that a more significant uptick in consumer and commercial bankruptcies is likely to follow the termination of government assistance and eviction moratoriums. Although consumer bankruptcies and commercial chapter 11's have already begun to rebound, most attorneys said their practices haven't returned to 2019 and early 2020 levels.

At the Miami office of Nelson Mullins, partner and bankruptcy and financial restructuring group vice chair Gary Freedman said the bankruptcy practice is doing worse than he would've predicted a year ago because the overall economy is doing surprisingly well. But like many of his peers, Freedman has found other work such that his overall billables are only slightly off his summer 2020 figures.

"Until recently, we were waiting for a tsunami to work. We didn't want to transition and pick up other significant work, and be unavailable to take on bankruptcy-related work," Freedman said. "Now, in the last four to six months, we've pivoted to other areas. I'm not that far off [my billables] personally, but there are others in my group that may not have the 35 years of business litigation experience, as I do, that makes it easy to pivot."

In the interim, Freedman said the practice is busy identifying industries that may be rife with filings later in 2021 and into 2022, such as health care and retail.

"We are currently developing groups at Nelson Mullins so that when financial distress hits a sector, we're ready to hit the ground running between the bankruptcy folks and other practitioners of law," he added. "We have a full-service approach to financial distress."

Craig Rasile, a bankruptcy partner at the Miami office of McDermott, Will & Emery, said his bankruptcy and restructuring billables are down about 25% from pre-pandemic levels. Despite the slowdown, he's optimistic that private equity could bolster his practice later this year and in 2021.

"We're starting to see a pickup in distressed investing; private equity funds that buy or lend to distressed companies will pick up soon, and that will create more opportunities," said Rasile, who primarily represents debtors (and some creditors committees) and does chapter 11 trustee and Securities and Exchange Commission receivership work.

"Before they invest or lend to a distressed company, they will require a bankruptcy filing," Rasile continued. "You'll see some quick bankruptcies where borrowers run through a process to discharge a boatload of debt, sell the assets to a buyer, and clean up the balance sheet."

Meanwhile, attorneys who handle small business bankruptcies have benefitted from the extension of the chapter 11 subchapter V debt limit, which was increased from $2.7 million to $7.5 million under the CARES Act, until March 2022.

The subchapter's patrons are often small businesses that had accumulated significant debt before the pandemic began, according to Tripp Scott creditors' rights and bankruptcy partner Charles Tatelbaum. Hospitality and transportation companies, such as his client Ted & Stan's Towing Service Inc., are among the industries he's seen utilize the subchapter.

"During the pandemic, people weren't out driving, so they had no business for months," he said. "All of the sudden, they have these big truck payments with lenders and the trucks are sitting idle. That's like a poster child of the type of business that has been suffering, and no matter how much their business revives, it will never bring in enough revenue to cover the back debt."

Despite the subchapter V interest, Tatelbaum said his overall billables are still down 15% from their pre-pandemic levels, including the non-bankruptcy work he's picked up doing loan documentation and handling disputes on sales of goods.

Consumer bankruptcies are still depressed across the country, but at least anecdotally, they've picked up in South Florida. Chad Van Horn, founder of the Van Horn Law Group, a Broward County bankruptcy boutique that recently expanded to Miami-Dade, told the Daily Business Review in June that May 2021 was his busiest month ever, and April 2021 his second biggest.

"You have record-high student loans, mortgages," Van Horn said in June, noting that credit card debt has dipped a bit, in part due to the stimulus money and enhanced unemployment. "Some people will try to pay down the debt if they can, but everything else is still up and unfortunately the income — after enhanced unemployment falls off — is not there to sustain the cost of living in Florida."

Tatelbaum said he attributes the increase in consumer filings to so-called "shadow debt," referring to the sum of various debts many consumers have accrued during the pandemic.

"There's forbearance, but the debt doesn't go away," Tatelbaum said. "It's accruing in various ways: not paying car loans, rent, credit cards — all of the sudden it has accumulated so much. What we are seeing is the consumers are saying, 'We've got to do something.'"

Part-time bankruptcy practitioners have also found success in complex bankruptcies. Luis Salazar, of the Coral Gables boutique Salazar Law, said bankruptcy doesn't dominate his multidisciplinary practice, but he's received a steady stream of chapter 11 work throughout the pandemic.

“You’ll see more filings when moratoriums end [and] there’s more pressure on tenants and homeowners,” he added.

But the slowdown has prompted many attorneys to fall back on other strengths.

Rasile said McDermott’s banner year in 2020, when the firm increased gross revenue by 17.9% and profits per partner by 25.6%, has helped him and his colleagues stay busy over the past year.

“A lot of lawyers in restructuring were trained in other practice areas before they wound up in bankruptcy,” Rasile said. “I was a trial lawyer, going to court three or four days a week, so the courtroom aspects of bankruptcy are second-nature to me.”

Rasile was able to fall back on experience as a maritime lawyer when a slew of force majeure disputes came McDermott’s way last year. Other busy McDermott practices with significant cross-over include real estate, lending, and capital finance, he said.

Freedman’s group at Nelson Mullins has been assisting financial institution clients on issues with borrowers, such as loan modifications, forbearances and deferred payments, rather than doing actual bankruptcy work.

“The emphasis has shifted from running to bankruptcy court to trying to give the borrower a leash to work through a financial situation,” Freedman said. “Some are going to work and some aren’t, but we’re not going to figure that out until the end of this year.”

Nason, Yeager, Gerson, Harris & Fumero partner and bankruptcy lead Ivan Reich said he’s taken advantage of asset protection work and the booming market for convertible notes, short-term debts that becomes equity in future financing rounds.

“There’s an incredible market in the buying and selling of convertible notes,” Reich said, adding that his total billables haven’t fallen since the pandemic hit.

At Shutts & Bowen, partner and creditors’ rights and bankruptcy chair Lee Mackson said he and his colleagues have pivoted to commercial litigation and real estate litigation.

“The beauty of working in a large firm is you can pivot to general commercial litigation. We’ve been successful at it,” he said.

Tatelbaum said he’s found ways to bring in bankruptcy-adjacent work as lenders have been more willing to enter into forbearance agreements with their debtors and modify loans.

“I’ve done more forbearance agreements in the last 15 months than in the last decade,” Tatelbaum said. “It’s not necessarily altruism — maybe some of it is — but an equal amount is the fact that, practically, working with a borrower to work out of a situation is producing a greater return than going in and getting it off the books.”

Lenders may also be willing to make deals to avoid classifying a significant number of distressed loans, which detracts from the money they can lend out, Tatelbaum said.

All of the attorneys interviewed for this story said they expected commercial filings to significantly increase by Q4 2021 or Q1 2022.

Rasile said he thinks government funds, eviction moratoriums, and an abundance of capital available to borrowers through loan closings and private equity acquisitions have only deferred the inevitable.

“We’re going to see more filings later this year and into next,” he said. “When the moratorium on evictions and foreclosures is lifted, that will lead to more workout negotiations, out-of-court workouts and negotiations. We’re starting to see that already, and it may end well. Or it may not, and companies may need to be restructured in court.”

Mackson said he expects non-class A retail and companies tied to business travel to suffer in the region.

“Travel is booming but a lot of hotels depend on business conferences, and as I’m aware, business travel is still at low levels,” Mackson said. “Those huge hotels in Miami, San Francisco, Dallas, Las Vegas — they’re not going to go under, but it could lead to some bankruptcies. It will probably start in Q1 at full force. The question is how long the ancillary industries can survive around that.”