



## US bankruptcy courts hunker down as coronavirus fears grip markets in 'a new normal'

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Before bankruptcy lawyers for Approach Resources left his Houston courtroom late last week, Judge Marvin Isgur wanted to make sure they knew something.

Sounding almost apologetic, the judge told Approach's attorneys—in court Friday (13 March) seeking approval of a severance plan for rank-and-file employees—that the US Bankruptcy Court for the Southern District of Texas had developed a protocol for handling court proceedings in the age of the coronavirus. Among its provisions, the policy laid out guidelines for an increased amount of telephone or video-conference hearings, limiting face-to-face contact as the COVID-19 virus infects a growing number of people.

As of last Friday's Approach hearing, the judge said, there was "zero" intention to put the procedures into effect. But that would change, he continued, if local or state authorities made announcements about restrictions on public gatherings. It was likely his court in Houston would follow their lead, which would mean adopting the coronavirus protocol, and altering how hearings are requested and carried out.

"I have no anticipation that we're going to implement it," Judge Isgur said, noting that as of Friday afternoon, his court had not yet shut down or adopted the protocol it drafted over the preceding weekend. He went on to say, however, "If we do, we won't allow people in the courtroom. So we intend to use all the technology available."

While Judge Isgur was speaking specifically about his courthouse in Houston, he could have been describing any number of bankruptcy courts across the country that must now balance high-stakes corporate restructuring cases with a public health crisis spurred by the spread of the COVID-19 virus. Over the past week, even before President Donald Trump made his announcement Monday (16 March) that Americans should avoid gatherings with 10 or more people, signs began emerging that bankruptcy courts were adopting new levels of flexibility to allow more remote access for lawyers and others involved in court-supervised restructurings.

Those hints of possible disruption became clearer on Monday. During an afternoon hearing, Judge Christopher Sontchi of the US Bankruptcy Court for the District of Delaware, the chief judge at one of the nation's busiest corporate bankruptcy courts, told lawyers involved in the Chapter 11 case of Art Van Furniture that he and others will avoid scheduling any trials during at least the next 30 days. Hearings that can take place over the phone, with witness testimony provided by sworn affidavits, will likely move ahead as normal, the judge added.

One of Judge Sontchi's colleagues in Delaware, Judge Karen Owens, said separately on Monday that she has decided to hold hearings by the telephone until at least the end of March, also suggesting that others

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on the Delaware bench would take a similar approach. Another highly active court for business disputes, the Delaware Chancery Court, announced that it has canceled all in-person court proceedings for 30 days and will either reschedule those that fall within the window, or attempt to conduct some of the hearings over the phone.

“The judges are all trying to make it business as usual as much as possible,” K. Elizabeth Sieg, a bankruptcy partner at McGuireWoods, told *Debtwire*.

By Monday evening, at least four bankruptcy courts that handle a large number of corporate Chapter 11 cases had announced coronavirus related policies: the District of Delaware, the Southern District of New York, and the Northern and Southern Districts of Texas. In Delaware, Judge Sontchi signed an order that states all hearings that are not time-sensitive, a determination made by individual judges, will be postponed “to a date to be determined on or after” 15 April. In the meantime, all hearings will be held by phone or video conference, with judges setting guidelines on a case-by-case basis as to how they would accept evidence during court proceedings.

Arthur Steinberg, a restructuring lawyer with King & Spalding, likened the response from bankruptcy courts and judges to medical triage procedures that hospital systems around the world are adopting to deal with an influx of COVID-19 patients. Just as a doctor would treat the most serious cases first, he said, judges will prioritize some matters over others.

“That’s what a bankruptcy does on a daily business,” said Steinberg. “They will handle the most emergent ones first.”

With an increase in telephone and video conference appearances, however, comes the risk of technical difficulties, which have already managed to rear their heads in some bankruptcy proceedings. During a telephonic hearing Monday on exit financing in the Pacific Gas & Electric Chapter 11 case in the US Bankruptcy Court for the Northern District of California, for instance, several participants were able to hear only garbled words from one lawyer who appeared to have a poor connection. Another lawyer said he has had court conference call lines malfunction because of the spike in people dialing in instead of appearing in person.

On Tuesday morning, Court Call, a service that sets up attorneys and other interested parties with lines to listen to court hearings, was overwhelmed by the increased load. Users attempting to set up a line waited nearly an hour for an operator, up from a hold of just a few minutes during standard business. As one Court Call operator said, it’s a “whole new frontier” for the service.

Court Call president and co-founder Mark Wapnick said in an interview today that the service has experienced a “dramatic” volume of calls as courts have adopted rules to increase the use of telephonic hearings. Like many employers, Court Call has taken steps to protect its employees from the virus by having many of them work from home, said Wapnick, noting that the transition to a remote workforce presented its own logistical challenges for his company. Now, he said, “We’re in control.”

Still, with a significant increase in calls, Wapnick acknowledged that those seeking to set up a line for future court hearings will likely have to be more patient than usual. He also urged any Court Call users to use the company's online portal as a first resort for scheduling.

"We're a life raft out there for people. So we're doing the very best we can in terms of trying to swallow a huge volume of work," said Wapnick.

Technical issues aside, conducting hearings by phone or other remote means creates challenges for matters that would normally require testimony from live witnesses. That approach can mean the kind of frustration that anyone who has been on a large conference call is used to—people accidentally speaking over each other and barking dogs from listeners who forget to mute their phones—but there are other issues unique to the legal process. As several bankruptcy lawyers explained, judges don't assess the statements from witnesses based solely on what they say, but a judge also has to consider a witness's demeanor and overall credibility, something that is hard to do without in-person contact.

"Looking the witness in the eye—the removal of that will be troublesome to most lawyers," said Ian Peck, chair of Haynes and Boone's restructuring practice. "It's a novel concept, something we haven't seen much in courts."

Beyond the increase in phone hearings and changes to the bankruptcy court procedures, coronavirus ultimately could have real consequences for companies seeking to navigate the process. For companies on the verge of bankruptcy, this period of market instability could "push them over" the edge, said Bradford Sandler of Pachulski Stang Ziehl & Jones.

Sandler added that, for companies that do enter Chapter 11 during the coronavirus era, they will likely have a harder time lining up debtor-in-possession loans to fund their operations during bankruptcy. Ted Gavin of Gavin/Solmonese echoed that point, and noted that lenders involved in bankruptcy cases may have challenges of their own to navigate.

"There's going to be pressure on lenders to extend credit and be more flexible. [There's] going to be a lot of pressure to prop up these companies," said Gavin, saying that it's unlikely that every Chapter 11 case would end up converting to a liquidation proceeding under Chapter 7 even if the capital markets are tight. "There's going to have to be a reexamination of expectations and lending capacity."

Still, as much of the world remains on edge about the coronavirus and the global response, multiple bankruptcy lawyers said they don't expect the process will get too bogged down. That's due, in large part, to the very nature of bankruptcy proceedings—they tend to be fast, judges tend to allow phone appearances for routine matters, and bankruptcy professionals tend to be used to shifting gears on a moment's notice.

"I think all the parties are going to have to end up being more flexible," said John Thompson, another McGuireWoods restructuring partner. "We have become accustomed to flexibility. ... I do think people will continue in that spirit."

As Thompson and others noted, bankruptcy lawyers and judges already know how to move cases through the courts on an expedited basis and

the logistical challenges that come along with that sort of speed. They'll have a chance to put those skills to use as long as coronavirus fears continue upending life as usual.

"I think we're moving into what might be a new normal," said Sandler.

by Scott Flaherty, Maria Chutchian and Kyle Younker

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