

CLEAR VIEWPOINTS

From Industry Leaders We Know and Respect



Daniel F. Fiorillo

Member, Otterbourg P.C.

Mr. Fiorillo is Chairman of Otterbourg's Workout and Restructuring Department. He joined the firm in 1997 and became a partner in 2005.

For over 20 years, Mr. Fiorillo has specialized in the representation of banks, hedge funds, commercial finance and factoring companies, specialty lenders, real estate lenders, private equity groups, corporations, fiduciaries and other institutional clients in all aspects of restructuring transactions, workouts, bankruptcy and other insolvency proceedings, including debtor-in-possession financing, cash collateral use arrangements, exit financing, distressed acquisitions of assets, assignments for the benefit of creditors, state and federal receivership proceedings, foreclosures and secured party sales. He has represented lender and borrower clients in various financing transactions, including asset-based revolving credit facilities, senior and junior secured term loans, mezzanine debt facilities, unitranche facilities, construction loans and cash flow loans. He has appeared before numerous federal and state courts across the country representing bank, commercial finance, hedge fund and private equity clients.

Mr. Fiorillo has lectured before numerous financial, trade and professional associations, and has published articles in various trade periodicals.

Q: When did you know you wanted to be an attorney?

A: My decision to become an attorney did not arrive in an "a-ha" moment. I grew up in a blue color family and didn't even meet an attorney until I was in college. During my junior year, at the persistent urging from a close college friend who thought I would make a good lawyer (probably because we argued over everything), I decided to take the LSAT. It was during the preparation for that test that I first realized being a lawyer could be a rewarding career that would allow me to use my personality and intellect to succeed.

Q: What led you to practice restructuring/bankruptcy law in particular?

A: Like many law school students, I was not too familiar with the corporate restructuring and bankruptcy law fields, set aside from a general understanding that declaring bankruptcy was viewed as a "bad thing". During my second year of law school (way back in 1995-96), I was extremely fortunate to land a summer associate position at Otterbourg. While rotating through the firm's insolvency and corporate restructuring departments, I became enthralled with the workout and restructuring practice. The creativity and intellectual dexterity required to solve complex business and legal problems stemming from financially distressed

companies drew me in like a moth to a flame.

Q: What are some of the difficulties you've encountered managing a department of professionals while working from home?

A: While Otterbourg began preparing for all operations of the firm to operate remotely as early as the first week in February 2020, navigating the uncertainty and unprecedented challenges was initially difficult. Thankfully, the attorneys and staff at our firm adapted quickly to overcome day-to-day operational issues and rallied together to continue providing the level of service that our clients deserve. As the pandemic continues, however, new challenges emerge. For example, giving junior level attorneys the opportunity to learn the practice in the heat of battle is sometimes a struggle. Instead of sitting together in an office preparing for a hearing or meeting, you have to remember to periodically schedule calls or zoom sessions with your team to ensure that everyone is being exposed to the legal issues and solutions. Another example, at least for my group, is reminding the members of my department to take time off from work. I think working from home for the last seven months has actually made it more difficult to find some time to relax and get away from the daily grind of the "cyber" office.



Q: What are some of the significant changes you have experienced in bankruptcy hearings being held via Zoom?

A: For one, preparing in advance for the technological aspects of a remote hearing via Zoom or similar platforms is critical. If you are the only person having “technical difficulties” during a hearing and cannot timely solve the issue, it could have potentially adverse consequences for you and your client. It is therefore imperative that you spend time in advance to prepare for as many contingencies as possible. Another change with remotely accessing bankruptcy hearings is not having the ability to have those infamous hallway negotiations outside of the courtroom to resolve issues with adverse parties prior to the bankruptcy hearing. Instead, greater efforts have to be taken to resolve objections well in advance of the hearing.

Q: Given Zoom hearings, do you find there to be a different level of involvement by the judges hearing cases compared to when they were doing so in person?

A: I am amazed at how quickly and efficiently the bankruptcy judges I have appeared before post-COVID have adapted to remote access hearings. The judges, in addition to presiding over an overwhelming surge of Chapter 11 cases over the past six months, have had to master the new technology and change the way they have run their courtrooms for many years. Pre-COVID, judges could focus exclusively on the law and the arguments being presented; now, judges must contend with connectivity issues, folks forgetting to mute their phone lines, and multiple attorneys inadvertently speaking over each other (or even the judge).

I am pleased to report, however, that in my experience, the bankruptcy judges and their staff have done a masterful job with managing the additional challenges presented by remote participation on top of having an active docket of Chapter 11 filings.

Q: Do you feel as though not having face to face hearings has complicated the bankruptcy process?

A: During the first month or so of the pandemic, the shift by the US bankruptcy courts to remote hearings made the bankruptcy process slightly more challenging to navigate for the reasons that I discussed above. However, within about a month's time, the learning curve among the bankruptcy courts and restructuring professionals operating exclusively in a remote access environment sharpened quickly. In fact, in some respects, remote hearings have made the bankruptcy process even more efficient! For example, the bankruptcy court in JC Penney conducted the case's first day hearing on a Saturday afternoon in May. Under the pre-COVID regime, there would have been little chance of having a Saturday afternoon first day hearing of a Chapter 11 case that size, with professionals having to fly across the country to arrive in Corpus Christi, Texas (the location of the JC Penney bankruptcy court). Instead, remote access enabled hundreds of professionals to participate in JC Penney's first day hearing without the necessity of leaving their homes.

Q: In 2020, there have been numerous bankruptcy cases where the debtor has refused to pay any or a vast majority of rent for the period when they were closed due to the pandemic. Has this created another level of complexity to an already



complex process? How do you see this issue impacting bankruptcy cases in the near-term?

A: Certainly, at the beginning of the pandemic, when a general moratorium of non-essential businesses was mandated in a number of states around the country, this issue certainly complicated large Chapter 11 cases filed around this time, especially in the retail sector. Companies that were denied access to their leased locations both prior to and after filing for bankruptcy were not inclined and/or able to pay the rent. In some states, like New York, landlords were unable to commence eviction proceedings by order of the governor's office. However, in Chapter 11, landlords have easy access to the court, as well as protections under the bankruptcy code that compel the Chapter 11 company to timely perform under the real estate lease, even though scores of commercial tenants not in bankruptcy were not paying their rent due to the pandemic, and the landlords had little recourse. In the Modell's Sporting Goods Chapter 11 case, which filed Chapter 11 on March 11, 2020 days before "stay at home orders" were issued in a large part of the Northeast, we (CTG and Otterbourg) worked with the company's professionals to obtain bankruptcy court approval of the then unprecedented relief of "suspending" the Chapter 11 proceedings during the pandemic-imposed business shutdown. This allowed the company to delay paying rent and making other payments during the Chapter 11 until the state-imposed moratoriums on conducting GOB sales were lifted. Ultimately, this led to the company brokering a settlement with the landlords to pay its rent arising during the shutdown over a period of time at a reduced rate, which greatly aided the administration of the bankruptcy case.

Q: Lenders appear to be very patient and accommodating with borrowers thus far during the pandemic. Can they continue to be patient with under-performing borrowers that show little hope of recovering? How do you see this playing out for the remainder of 2020 and into 2021?

A: I think lenders have to carefully assess their recovery strategies and prospects in the post-COVID world, as sometimes following the traditional workout playbook may not be the best course. For example, at the outset of the pandemic, we saw some lenders permit their financially distressed borrowers to mothball their businesses and adopt a wait and see approach to the pandemic's impact, as it made little sense at that time for the company to pursue a sale or wind down in a bankruptcy process. Now that we are 8 plus months removed from the start of the pandemic, I think most lenders have adjusted to the "new normal", and as such, we have observed our lending clients employing a more traditional approach to their financially distressed borrowers, including requiring their clients to provide a clear achievable exit strategy as a condition to the lender's cooperation.

Q: What do you like to do in your spare time?

A: Well, I love to run whenever I get the chance. The half marathon is my favorite race (long enough to feel good about your run without injuring yourself). And now that my twin 10-year old sons like to run with me, it is even more fun! I also try to play golf (or, more accurately, donate golf balls to the course), and spend as much time with my wife and 4 kids as I can. Currently my 17-year-old daughter, who dreams of one day performing on Broadway (whenever it opens again) is applying



to colleges, so that has been a major source of drama (pun intended) within my household. Otherwise, I am looking forward to getting back to “normal” routines again, such as having in-person meetings with clients, colleagues and friends without the social distancing and other pandemic restrictions that we all must observe. And of course, attend a Mets game with my sons again.