

## ***Guidance for Navigating COVID-19's Impact on Business***

By [Robert W. Dremluk](#)

March 30, 2020

COVID-19 has caused tremendous disruption in our personal lives and our business activities. The business disruption is particularly problematic due to the uncertainty of when things may return to normal and the damage left in the wake of the pandemic. This article addresses some of the issues businesses are facing and provides some guidance and recommendations that affected parties may want to consider as we navigate troubled waters.

Financial distress is triggering a lot of issues that breakdown into five main categories: (i) interpretation and enforcement of contract provisions such as *force majeure* clauses and concepts such as impossibility of performance, (ii) availability of insurance such as business interruption insurance for owners of businesses and other types of insurance that may be available to satisfy claims of third parties, (iii) difficult employment issues such as termination or furloughing of employees, (iv) treatment of real property lease rights and obligations, and (v) enforcement or forbearance of loan obligations.

Each of these categories present multiple sub-issues. This article will highlight them. In addition, this article will provide a summary of a recent amendment to the Bankruptcy Code that is designed to streamline the bankruptcy process for small businesses or individuals engaged in business.

### **Force Majeure and Impossibility of Performance**

Many contracts contain *force majeure* clauses that are intended to waive performance of contractual obligations where an event described in the clause occurs. While the concept is simple, the language and interpretation of such clauses in the context of the COVID-19 pandemic raises numerous questions and causes substantial uncertainty. One fundamental question is whether the COVID-19 crisis constitutes an event of *force majeure*. Typically, these events include hurricanes, tornadoes and floods and some provisions may also cover work stoppages, labor strikes, the unavailability of materials and services, actions taken by governmental authorities, wars riots and embargos. However, many agreements do not specifically list pandemics, outbreaks and widespread infectious disease as *force majeure* events.

### **Availability of Insurance**

At first blush, one would assume that business interruption insurance would apply to the COVID-19 crisis, but that's probably not the case. The reason is that such clauses were drafted for situations where business premises are damaged causing a disruption in business activity. A good example of such an event would be the 9/11 attack.

However, the premises damage issue seems pretty farfetched in the context of the COVID-19 crisis. That said, it would not be surprising for insureds to try to trigger such coverage in some creative ways. Other types of insurance regarding third party claims include general liability insurance, workers compensation insurance, directors and officer's insurance and errors and omissions coverage.

### **Employment Issues**

Many businesses - particularly those in the hospitality and travel industry - were forced to substantially reduce staff because their business activity has virtually dried up. And, because of mandated shelter in place orders issued by a number of states and cities, all employees in those places have been forced to work remotely, if possible. Anecdotally, very few employees were prepared to work remotely, thus, putting pressure on businesses to function properly. There are other employment issues such as compliance with federal and state WARN Act requirements. And, of course, there are longer term issues with respect to replacing terminated employees once things return to normal which could be highly problematic.

### **Real Property Leases**

The real estate industry is a highly integrated business where layers of interests function together to provide space for residential and business activities. Any disruption in that balance of interests can be very challenging. That said, common sense would suggest that every entity involved in real estate should be temporarily waiving counterparty obligations until the economy is stabilized. Otherwise one could create a domino disruption in the market that hurts all parties. While the stimulus package may help to provide some liquidity to address a tenant's inability to pay rent or an owner's inability to pay its mortgage, the current stimulus package may need further tweaking to address the complex economic issues facing the real estate industry. A few creative options include short term rent deferral or reduction, possibly supported by guarantees, application of security deposits, or with respect to shopping center properties, the payment of CAM only. In any event, lenders and, landlords need to stay calm and let tenants regain their footing if the value of their bargains are to be realized.

### **Loans**

Lenders and borrowers need to communicate frequently and transparently about whether the terms and conditions of their agreement can be timely and fully performed. More than likely some form of relief like forbearance or loan modification will be necessary. In addition, landlords need to review their loan documents which may limit or prohibit any lease amendment without the lender's consent. However, one of the first things to do with loans is to sign a pre-negotiation agreement that will minimize risk to all parties as they try in good faith to resolve issues.

## **Small Business Bankruptcy Relief**

The United States Bankruptcy Code was recently amended to streamline the bankruptcy process for small businesses and individuals engaged in business by reducing the administrative activity and the related costs to create a more efficient and less costly way for a small business to restructure debt and reorganize its business. Within the past few days, Congress proposed legislation in connection with the COVID-19 crisis that will temporarily increase eligibility to file a small business bankruptcy case by increasing the debt ceiling for aggregate secured and unsecured debt from \$2,725,625 to \$7.5 million. Obviously if the debt ceiling is increased, more small businesses would be eligible to file bankruptcy under the new statutory scheme.

Three key highlights of the new small business bankruptcy are (i) simplicity, (ii) retention of equity and reduced time and costs. Restructuring debt and reorganizing a business are the goals of the bankruptcy process. Under the standard provisions of Chapter 11, a debtor is required to file and obtain court approval of a disclosure statement to confirm a plan of reorganization. The process is time-consuming and expensive.

Under the new law however, a debtor is not required to file or obtain approval of a disclosure statement. This creates a much more efficient process and enhances the ability of a company to reorganize. As a parallel feature, a debtor is not required to solicit acceptances of its plan. However, creditors can object to a plan that a debtor no longer needs the affirmative votes of creditors to confirm. This change in the bankruptcy plan process makes Chapter 11 more efficient, less expensive and more likely to result in a successful reorganization for a small business.

In addition, there are no committees of unsecured creditors, thereby removing the cost and delay of funding of professionals hired to represent creditors who in some cases cause more problems than they solve. From a timing perspective, a debtor has 90 days to file a plan which should move a case along and keep administrative expenses down.

Finally, existing owners of the debtor in a traditional Chapter 11 cases could only retain their equity over the objection creditors if the creditors were paid in full — or, in certain limited instances, if the existing owners injected sufficient “new value” into the company. Many owners of small businesses could not satisfy this requirement and would lose ownership and control of their company. Now, existing owners of the debtor can retain their equity over the objection of a class of unsecured creditors so long as they commit all of the disposable income of the debtor to pay creditors over a three- to five-year period. This creates an avenue for a business owner to continue to operate his company.

It has been reported that Congress’s federal aid package aimed at weakening the COVID-19 pandemic’s economic sting has several features to help financially struggling individuals who turn to bankruptcy for relief, including a guarantee they won’t have to

give up stimulus checks to pay off overdue bills. In other words, people who file for bankruptcy protection are not required to turn over any federal money they receive from the stimulus package to cover past debts. Usually, debtors are required to either turn over valuable possessions or pledge to repay a portion of their debt for several years before they can cancel the debt that remains.

Our Corporate Law and Bankruptcy, Distressed Debt & Restructuring practice groups are available to counsel and assist businesses and other organizations. For more information, please contact Robert Dremluk at [rdremluk@cm.law](mailto:rdremluk@cm.law).

---

*The foregoing content is for informational purposes only and should not be relied upon as legal advice. Federal, state, and local laws can change rapidly and, therefore, this content may become obsolete or outdated. Please consult with an attorney of your choice to ensure you obtain the most current and accurate counsel about your particular situation.*

---



**[Robert W. Dremluk](#)** is a partner at Culhane Meadows PLLC in the firm's New York office. A business lawyer who delivers real value to clients, he makes it a point to understand a client's business and objectives and then identify the best framework to deliver innovative and practical solutions.

---

### **About Culhane Meadows – *Big Law for the New Economy*®**

The largest woman-owned national full-service business law firm in the U.S., Culhane Meadows fields over 70 partners in ten major markets across the country. Uniquely structured, the firm's Disruptive Law® business model gives attorneys greater work-life flexibility while delivering outstanding, partner-level legal services to major corporations and emerging companies across industry sectors more efficiently and cost-effectively than conventional law firms. Clients enjoy exceptional and highly-efficient legal services provided exclusively by partner-level attorneys with significant experience and training from large law firms or in-house legal departments of respected corporations. U.S. News & World Report has named Culhane Meadows among the country's "Best Law Firms" in its 2014 through 2020 rankings and many of the firm's partners are regularly recognized in Chambers, Super Lawyers, Best Lawyers and Martindale-Hubbell Peer Reviews.