MARCH 27, 2020

COVID-19: Preserving Your Business in a Pandemic

Author: Robin B. Schwill

There is abundant information circulating about the extreme financial toll that the COVID-19 pandemic is expected to take on businesses across the globe. Here we address what creditors and debtors can do now to manage risk and preserve their value through this crisis.

What Creditors Can Do Now

The primary, and decidedly difficult, business judgment to make as a creditor is whether or not your debtor is expected to recover financially from this event. If yes, then the most prudent course of action under the current circumstances would be to preserve your existing contractual rights by negotiating some form of enforcement forbearance or payment deferral arrangement on terms that provide for a form of reasonable compensation when this crisis has abated. The key here will be defining exactly when this will be considered to have occurred. For operating lenders, the course of action would involve assessing and implementing the ability to reframe draw conditions and related parameters.

Even if the answer is no, in today's environment, the foregoing is still likely to be the most prudent course of action, to be guided by the availability of feasible alternatives as time passes. Overly opportunistic actions should be seen as carrying a significantly enhanced liability profile and, with currently limited court access, a great degree of implementation risk. Enforcement action should only be seriously contemplated if significant material and immediate prejudice, which cannot be compensated later, can be demonstrated.

Creative but meaningful compensation for forbearance or deferral arrangements at this time will be hallmarks of good deal-making in such unprecedented circumstances.

What Debtors Can Do Now

Amid mounting evidence that the economic toll of the COVID-19 pandemic will be severe, all businesses, even those that are currently robust and profitable, must consider the potential impact of the outbreak on their cash flow and liquidity. The key points to remember in times of financial distress – whether this distress is a perception of others or a reality – are consistent communication with your creditors and the need for a credible plan for dealing with any adverse liquidity conditions. Here, again, creative but meaningful compensation for forbearance or deferral arrangements may rule the day.

For otherwise cash-flow positive businesses that can demonstrate a likely recovery to similar conditions once current conditions resolve, there may also be an option to defend against overly opportunistic creditor actions. Such facts could support a court application to stay enforcement actions or other remedies sought by any given stakeholder, defer specified payment obligations and permit ongoing operations in a scaled back or "care and maintenance" context, while preserving shareholder ownership and value. When the pandemic is over and positive cash flows have resumed, such a stay can be terminated while curing all defaults and resetting all deferred debt to where it was at the date protection was invoked, obviously with some tweaks to fit any particular situation. Despite the current partial closure of the courts, it is still possible to bring an urgent application of this nature.

While the specifics of this solution are relatively detailed and complex, and its implementation is yet to be tested in our courts, it may be a feasible initiative under these extraordinary, yet temporary, circumstances.

Any member of the Davies Restructuring team would be pleased to discuss these considerations with you if necessary or warranted for your organization.

Key Contacts: Robin B. Schwill, Natasha MacParland, Denis Ferland, Christian Lachance and Gabriel Lavery Lepage

This information and comments herein are for the general information of the reader and are not intended as advice or opinions to be relied upon in relation to any particular circumstances. For particular applications of the law to specific situations the reader should seek professional advice.

© 2024 DAVIES WARD PHILLIPS & VINEBERG LLP