LAW ALERT

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Part II-Restructuring and Bankruptcy Options to Save your Company from the Brink: Large Company Solutions for Small and Mid-Market Enterprises

As discussed in the initial installment of *Restructuring and Bankruptcy Options to Save your Company from the Brink* (March 25, 2020, https://rmfpc.com/wp-content/uploads/2020/03/MSA-Alert-Restructuring-and-Bankruptcy.pdf), the COVID-19 pandemic has forced governments, business owners and consumers to radically adjust the way that they govern, engage in commerce, and live their daily lives. More than six weeks after unprecedented directives closing schools, shuttering businesses, and directing people to remain in or near their homes in very small groups, State and Federal authorities are now strategizing a path to re-opening the country. Stating that re-opening commerce requires everyone to accept what is the “new normal”, Governor Andrew Cuomo (NY) announced the *Reimagine New York* task force comprised of state and local leaders. The Reimagine New York task force will assess the lessons learned from the COVID-19 pandemic, and strategize and address necessary changes.

Devastated businesses already have claimed the initial resources committed to the CARES Act Payment Protection Program (“PPP”) loans, and the President has signed an extension or supplement to the program. What remains as true now as then, the short and long-term economic impact of COVID-19 may not fully manifest itself for months or years. However, enterprises already have, or are contemplating their restructuring strategies.

Current State of Affairs

On April 16, 2020, Governor Cuomo signed Executive Order 202.18, extending all restrictions on businesses, schools and social gatherings through May 15, 2020. [1]

Relief Efforts

Federal, state and local governments continue their efforts to mitigate the economic effects of the pandemic, and provide relief to beleaguered businesses and consumers. An additional $484 Billion in COVID-19 relief, including $320 Billion for the PPP, passed with bi-partisan support, and was signed into law by President Trump. In addition, governors and mayors of the hardest hit locations are pressing the President and congress to include more resources for states and municipalities in the next stimulus package. While President Trump has expressed some interest in such measures, Sen. Mitch McConnell (KY) is on record that he would prefer making bankruptcy available to the states rather than support legislation making federal funds available.

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[1] For a complete list, see Guidance on Executive Order 202.6 https://esd.ny.gov/guidance-executive-order-2026

The Fallout

While it may not have been the sole factor, the COVID-19 pandemic represents the tipping point for companies in all business sectors to restructure, reorganize and/or file for Chapter 11 bankruptcy protection. On April 20, 2020, the price of U.S. Crude oil settled at ***minus*** $37.63 per barrel. Several U.S. energy companies already have filed for bankruptcy relief, including, Yuma Energy, Inc. and Longview Power, LLC. In addition to energy companies, other sectors of the economy seem to be facing the same fate. J.C. Penney, already reeling from decreased in-store traffic as consumers shift to the internet, missed interest payments due in April, and reportedly is strategizing a bankruptcy filing. Similarly, Neiman Marcus missed several bond payments, and an imminent Chapter 11 looms. Quorum Health Corp., a network of health care institutions, filed for Chapter 11 protection on April 16, 2020. Frontier Communications Corp., a national provider of telecommunications services in 29 states, filed for bankruptcy protection on April 14, 2020.

Chapter 11 - Not Just for Big Business

While large, well-known companies garner all of the headlines related to bankruptcy, small and mid-market companies can benefit from Chapter 11. Many companies are facing the legal and financial repercussions of missed rent obligations, loan payments and tax payments directly resulting from COVID-19. Lost revenues may result in unpaid wage and labor obligations, contract breaches, and inability to pay for goods and services provided prior to the shutdown. Notwithstanding the influx of additional relief, many small and mid-market businesses may be shut out of PPP loans that may have carried them through some or all of this unprecedented period.

Though not a panacea, Chapter 11 is a tool that every business owner, operator and investor must consider to blunt the economic impact of COVID-19. One of the most significant features of a bankruptcy filing is the “automatic stay”, which provides a breathing period or respite from collection or enforcement activities. Substantially all collection efforts, litigations and enforcement proceedings are stayed. Contract partners may be prevented from terminating licenses and agreements, including real property leases. This protection extends to enforcement by governmental units (except for criminal proceedings or enforcement of police powers). Any action taken in violation of the automatic stay is void.

Existing management remains in place, and management may retain one or more restructuring professionals including attorneys, financial advisors and brokers to assist in implementing its strategy. Liquidity may be obtained in the form of an equity investment or new credit facility. The bankruptcy process permits the company to: (i) jettison unprofitable or burdensome contracts or above market real property leases; (ii) re-structure its obligations with both secured and unsecured creditors; (iii) re-negotiate (or reject) collective bargaining agreements; (iv) sell some or all of its assets; and (v) close or sell off locations, affiliates or subsidiaries. Ultimately, the goal is to formulate and obtain court approval of a plan of reorganization.

Congress recently enacted the Small Business Reorganization Act of 2019 (the “SBRA”). The purpose of the SBRA was to decrease the economic and procedural burdens of Chapter 11. The original SBRA applied to those companies with secured and unsecured debt under $2,725,625. However, the CARES Act increased the limit to $7,500,000, making this accessible to more small businesses facing crisis as a result of the pandemic.

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Conclusion

It is imperative that all business owners implement immediate and aggressive strategies to combat the impact of the pandemic. Bankruptcy is a tool utilized by businesses across the economic spectrum to halt litigation or collection efforts, protect assets, and ultimately re-structure the company to prevent loss and pursue economic success. All businesses large and small should consider bankruptcy to survive this social and economic crisis.

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