



SHERYL P. GIUGLIANO / PARTNER

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EDUCATION

- ▶ St. John's University School of Law (LL.M, 2010)
- ▶ St. John's University School of Law (J.D., 2008)
- ▶ University of Michigan (B.A. in Political Science, 2003)

PRACTICE AREAS

- ▶ Corporate Restructuring & Bankruptcy
- ▶ Financial Services, Banking & Bankruptcy

SHERYL P. GIUGLIANO is a Partner at Ruskin Moscou Faltishek, P.C., in the Corporate Restructuring & Bankruptcy practice group. Her experience includes restructuring, bankruptcy, and litigation. Sheryl works with companies facing solvency issues to identify a solution and implement a strategic response, which includes negotiating with interested parties, creditors, and shareholders, and may also include filing for bankruptcy protection, or facilitating an out-of-court wind down.

She represents middle-market companies facing operational or litigation issues, guiding them through the Chapter 11 or Chapter 7 process to a successful reorganization or liquidation. Sheryl also represents trustees and receivers by assisting in the analysis and recovery of assets and prosecution of litigation claims, as well as secured and unsecured creditors identifying and enforcing their rights, assisting in their efforts to extend financing or consent to the use of cash collateral. In addition, Sheryl has represented contract counterparties negotiating for the highest possible cure payment or claim, defendants in preference and fraudulent conveyance actions (both in bankruptcy litigation and negotiating settlements to avoid protracted litigation), and purchasers in bankruptcy auctions.

Sheryl was selected as a New York Metro "Rising Star" by Super Lawyers for 2015-2020 and received the Turnaround Management Association Long Island Chapter 2016 "Spirit Award" for Outstanding Service.

She earned her LL.M. degree in Bankruptcy from St. John's University School of Law, and has utilized her extensive experience in bankruptcy to expand her practice as a business-oriented lawyer. Sheryl's litigation experience includes representing parties in bankruptcy litigation and general commercial matters. She has represented parties engaged in contract disputes in state and federal court, as well as arbitration matters before AAA and JAMS, and mediation, successfully and efficiently represents clients to achieve the optimal outcome.

PUBLICATIONS

- ▶ “Compensation for Services Rendered Prior to Retention Order is Authorized, Even Without Nunc Pro Tunc Approval,” *The Bankruptcy Strategist*, July 2020
- ▶ “SCOTUS: No Safe Harbor Protection Where Financial Institutions are Mere Intermediaries,” *The Bankruptcy Strategist*, April 2018
- ▶ “Expansion of the Barton Doctrine to Unsecured Creditors’ Committees,” *The Bankruptcy Strategist*, April 2017
- ▶ “The Intent of Section 546(e),” *The Bankruptcy Strategist*, February 2017
- ▶ “Seventh Circuit Takes the Road Less Traveled, and Looks to the Substance of 546(e),” *The Bankruptcy Strategist*, September 2016
- ▶ “Valuing Bids in Bankruptcy Auctions,” *The Bankruptcy Strategist*, March 2016 (co-author with Adam L. Rosen)
- ▶ “Spotlight on the Section 546(e) Rift,” *Law360*, November 2015
- ▶ “Assignment of Rents: Substance Over Form and Meaning of ‘Property of the Estate’,” *Bloomberg BNA Real Estate Law & Industry Report*, Vol. 6, No. 4, February 2013 (coauthor with Adam L. Rosen)
- ▶ Consolidated Appropriations Act, 2021 (PPP II) Potentially Important Changes to the Bankruptcy Code Impacting Commercial Parties (*Corporate Restructuring & Bankruptcy*, *Corporate Restructuring & Bankruptcy*)
- ▶ RMF Attorney Sheryl P. Giugliano Moderates Panel At The Association of Insolvency & Restructuring Advisors 19th Annual Advanced Restructuring and Plan of Reorganization Conference (Announcements)
- ▶ Seventeen Ruskin Moscou Faltischek Attorneys Named As New York Metropolitan Area Super Lawyers For 2020 (Press Releases)
- ▶ Ruskin Moscou Faltischek, Welcomes Sheryl P. Giugliano To The Firm. (Press Releases)
- ▶ RMF Attorney Sheryl P. Giugliano To Co-Moderate New York Institute of Credit Virtual Smorgasbord Panel. (Announcements)
- ▶ Bankruptcy Q&A: What Commercial Landlords Need To Know (Articles, *Corporate Restructuring & Bankruptcy*)

SPEAKING ENGAGEMENTS

- ▶ Moderator, “Judicial Operations During COVID-19 (Who can be in the room where it happens?),” *Association of Insolvency & Restructuring Advisors*, New York, New York (2020)
- ▶ Co-Moderator, “Leadership: Women’s Division Program: How We Are Coping During COVID,” *New York Institute of Credit*, Virtual Smorgasbord (2020)
- ▶ Panelist, “COVID-19 Survival Skills: The New Normal and How to Adjust Your Business and Its Relationships,” *Turnaround Management Association – Long Island Chapter*, Virtual Webinar Series (2020)

- ▶ Panelist, “A Lifeline for Small and Medium-Sized Businesses in Distress: A Practical Guide to the Small Business Reorganization Act (SBRA) as Supercharged by the CARES Act,” New York City Bar Association, New York, New York (2020)
- ▶ Moderator, “Litigation Funding Through the Life of Bankruptcy Case,” Association of Insolvency & Restructuring Advisors, New York, New York (2019)
- ▶ Panelist, “Ethics: Who is the Client?”, American Bankruptcy Institute, Mid-Level Professional Developmental Program, New York, New York (2019)
- ▶ Panelist, “Fraud Litigation, Enforcement & Contentious Insolvency,” Knect 365 Asset Recovery in America Conference, New York, New York (2019)
- ▶ Moderator, Judiciary Night: Women in the Law – A Look Back at 50+ Years, Turnaround Management Association, Long Island Chapter (2019)
- ▶ Panelist, Business Bankruptcy Basics Part I: Creditor Strategies at the Beginning of the Bankruptcy Case, American Bar Association, Webinar (2019)
- ▶ Panelist, Business Bankruptcy Basics Part II: Creditor Strategies During the Middle and End of the Bankruptcy Case, Am can Bar Association, Webinar (2019)
- ▶ Panelist, Association of Insolvency and Restructuring Advisors 35th Annual Conference “Financial Toolbox,” Boston, Massachusetts (2019)
- ▶ Panelist, Association of Insolvency and Restructuring Advisors 33rd Annual Conference “Financial Toolbox,” Dallas, Texas (2017)
- ▶ Moderator, Creditors’ Rights and Bankruptcy Litigation Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, “In-House Insights in Bankruptcy Litigation,” New York, New York (2017)
- ▶ Moderator, Turnaround Management Association, Long Island Chapter, “Politics and the Economy,” Woodbury, New York (2016)
- ▶ Panelist, Association of Insolvency and Restructuring Advisors 32nd Annual Conference “Financial Toolbox,” Coronado, California (2016).
- ▶ Co-Moderator, “Leadership: Women’s Division Program: How We Are Coping During COVID,” New York Institute of Credit, Virtual Smorgasbord (2020)
- ▶ Panelist, “COVID-19 Survival Skills: The New Normal and How to Adjust Your Business and Its Relationships,” Turnaround Management Association – Long Island Chapter, Virtual Webinar Series (2020)

MEMBERSHIPS

- ▶ The New York Bar Foundation – Fellow (2020)
- ▶ Chapter 11 Lawyers Advisory Committee, U.S. Bankruptcy Court for the Eastern District of New York – Member

(2018 to Present)

- ▶ Turnaround Management Association, Long Island Chapter
 - a. Vice President Programming (2020)
 - b. Co-Vice President Programming (2019)
 - c. President (2018)
 - d. President Elect (2017)
 - e. Board of Directors – Member (2014-2016)
- ▶ Turnaround Management Association, New York Chapter – Programming Committee member (2015 – 2017)
- ▶ American Bankruptcy Institute – Member (2010-2020)
- ▶ New York City Bar Association – Bankruptcy & Corporate Reorganization Committee Member (2016-2020)
 - a. Third Party Release Subcommittee – Chair (2019-2020)
 - b. Third-Party Release Subcommittee – Co-Chair (2018 – 2019)
- ▶ Association of Insolvency and Restructuring Advisors – Member (2016 – 2017)
- ▶ New York State Bar Association – Member (2010 – 2020)
 - a. Federal and Commercial Litigation Section (2017 – Present)
 - b. Bankruptcy & Creditors’ Rights Litigation Committee – Co-Chair (2017 – 2020)
- ▶ New York Institute of Credit Women’s Division – Member (2020)



MICHAEL S. AMATO / PARTNER

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EDUCATION

- ▶ St John's University
School of Law, (J.D., 1994)
- ▶ State University of New York at
Stony Brook (B.A., 1989)

PRACTICE AREAS

- ▶ Alternative Dispute Resolution
- ▶ Commercial Litigation
- ▶ Corporate Restructuring
& Bankruptcy
- ▶ Employment
- ▶ Financial Services, Banking
& Bankruptcy

MICHAEL AMATO is a Partner at Ruskin Moscou Faltishek, where he is the Chair of the Corporate Restructuring & Bankruptcy Practice Group, and a member of the Litigation Department.

Michael is a skilled bankruptcy attorney with considerable experience representing debtors, creditors, trustees and creditor committees in complex restructuring and reorganization matters. He focuses his practice on business reorganizations and restructurings, and bankruptcy litigation. Michael has advised clients in negotiating, structuring and drafting complex Chapter 11 plans and debtor-in-possession financing agreements. He regularly represents parties in interest in bankruptcy litigation, including fiduciary duty and fraud claims, actions to avoid preferential transfers and fraudulent conveyances, turnover proceedings and actions to recover assets.

Michael's litigation experience includes both jury and non-jury trials in federal and state courts. He has represented clients in complex commercial matters, including shareholder valuation and dissolution actions, unfair competition and labor matters, including wage and hour claims.

Michael has extensive experience in alternative dispute resolution, and is an approved mediator in the United States Bankruptcy Court for both the Eastern and Southern District of New York.

Michael is an active member of the Suffolk County Bar Association and is currently Co-Chair of the Bankruptcy and Insolvency Committee, as well as a member of the American Bankruptcy Institute.

LECTURES

- ▶ December 17, 2014, Capitalizing on Financial Opportunities—Speaker
- ▶ December 4, 2014, New York Sales and Use Tax—What Every Professional Should Know—Speaker
- ▶ November 13, 2014, Mortgage Foreclosures and Workouts—Speaker
- ▶ October 29, 2014, How to get Paid and What to do When you Don't – Speaker
- ▶ January 9, 2014, Section 363 Sales in Bankruptcy Cases; Financial, Ethical & Practical Issues – LI TMA – Moderator
- ▶ August 28 – 29, 2013, Northeast Regional Conference – TMA – Moderator
- ▶ May 14, 2013, A Primer on Foreclosure and Bankruptcy: What Every Solo Practitioner Needs To Know – Speaker
- ▶ February 27, 2013, Your Next Chapter 11 Case Should Be In The Eastern District of New York – LI TMA – Moderator
- ▶ December 11, 2012, Mortgage Foreclosures and Workouts, NYSBA – Speaker
- ▶ August 29 – 30, 2012, Disclosure Issues in Turnaround Situations, TMA – Speaker
- ▶ April 4, 2012, Moderator, Using Social Media as a Business Generating Tool, LI Turnaround Management Association
- ▶ January 31, 2012, Bankruptcy Ethics and Civility, Federal Bar Association
- ▶ November 1, 2011, Moderator, LI-TMA/Nassau County Bar Association Judiciary Night
- ▶ July 13, 2011, Understanding the Warning Signs of Bankruptcy, Esquire Bank
- ▶ May 9, 2011, Dealing with Residential Foreclosure, N.Y. State Bar Association
- ▶ April 18, 2011, Beyond No Comment; Communication Programs to Shape Positive Turnaround Outcomes
- ▶ April 14, 2010, Mediation, Financing and Professional Compensation in Chapter 11 Matters – Nassau Academy of Law – Speaker
- ▶ March 18, 2008, Guaranties in Business, Can't Live With Them, Can't Live Without Them
- ▶ September 10, 2007, Preferences and Reclamation – NY Institute of Credit – Speaker
- ▶ March 22, 2007, Bankruptcy Roundtable: A Practical Approach to Preferences, Reclamation and Administrative Claims
- ▶ January 10, 2006, Chapter 11 Bankruptcy Basics, State Bank of Long Island

PUBLICATIONS

- ▶ SBA Publishes Additional Guidance and FAQ's on Eligibility for Paycheck Protection Program (Alerts, Financial Services Banking and Bankruptcy)
- ▶ Part II-Restructuring and Bankruptcy Options to Save your Company from the Brink: Large Company Solutions for Small and Mid-Market Enterprises (Alerts, Financial Services Banking and Bankruptcy)
- ▶ Restructuring and Bankruptcy Options to Save your Company from the Brink (Alerts, Financial Services Banking and Bankruptcy)



About RMF

Ruskin Moscou Faltischek is the premier Long Island law firm. Founded in 1968, the firm has consistently evolved and expanded to meet our clients' changing needs. As specialized as we are diverse, we have built cornerstone groups that represent all major practice areas of law including: corporate & securities, financial services, commercial litigation, insurance, defense, and coverage litigation and advice, health care, real estate, employment, and trusts & estates. Our clientele is diverse, sophisticated and includes large and mid-sized corporations, privately held businesses, institutions and individuals. With more than 70 attorneys, superior knowledge of the law, polished business acumen and proven credentials, Ruskin Moscou Faltischek has earned a reputation for excellence and success. It is this ongoing achievement that makes us an acknowledged leader among our peers and the preferred choice among Long Island and New York business leaders.

The strength of Ruskin Moscou Faltischek's resources greatly enhances what we can accomplish for our clients – to not only solve problems, but to create opportunities. We take pride in going beyond what is expected from most Long Island based law firms. The invaluable contacts and relationships we have nurtured in the financial, venture capital and business communities heighten our value added services. Our knowledge of technology and business models enables us to guide clients to the next level in their business evolution. Our intellectual capital, multidisciplinary approach, and ability to navigate through the complexities of each court and administrative forum in which we practice enable us to efficiently and cost-effectively provide "Excellence. Period."

It is commonplace for Ruskin Moscou Faltischek's attorneys to be actively involved within the Long Island and New York, (city and state), communities in which we work and live. This includes lecturing and participating in professional groups and associations, serving on leading corporate, school and government boards, and working in charitable and civic organizations. We value our clients and our communities. Ruskin Moscou Faltischek pledges its continued commitment to both.

Practice Areas

Alternative Dispute Resolution	Health Law: Transactional
Commercial Litigation	Healthcare Finance
Construction	Healthcare Professionals
Corporate & Securities	IDA & Municipal Development Incentives
Corporate Governance	Insurance & Insurance Litigation
Corporate Restructuring & Bankruptcy	Intellectual Property & Technology
Cybersecurity and Data Privacy	International Practice Group
Digital Media Law	Municipal & Government Affairs
Employment	Not-For-Profit
Energy	Real Estate
Environmental	Tax Certiorari & Condemnation
Estate Litigation	Trusts & Estates
Financial Services, Banking & Bankruptcy	White Collar Crime & Investigations
Food & Beverage	Zoning & Land Use
Health Law: Regulatory	



Practice Area

Corporate Restructuring & Bankruptcy

Our Corporate Restructuring & Bankruptcy practice group provides creative and pragmatic solutions for complex restructurings, reorganizations and bankruptcy matters. RMF professionals regularly represent parties in interest in Chapter 11 cases, including:

- Debtors
- Secured and Unsecured Creditors
- Institutional and Private Lenders
- Trustees
- Creditors' Committees
- Landlords
- Contract Parties
- Vendors, including Critical Vendors
- Equity Holders, Officers and Directors

RMF's professionals can advise clients in distressed situations in a wide variety of Chapter 11 bankruptcy cases, including but not limited to:

- Financial Institutions
- Construction
- Commodities
- Communications
- Food and Beverage
- Education
- Energy
- Shipping and Transportation
- Healthcare
- Manufacturing
- Not-for-Profit
- Professional Services
- Real Estate
- Retail
- Technology
- Textiles

In addition to handling transactional insolvency matters, our expertise extends to all manner of complex bankruptcy litigation, including preferential and fraudulent transfer claims, breach of fiduciary duty and fraud actions, and turnover proceedings.

Each situation requires a unique solution, and circumstances may necessitate an alternative to bankruptcy. RMF's professionals are skilled advocates in all manner of out of court restructurings and reorganizations, including workouts and assignments for the benefit of creditors.

Department Chairperson

Michael S. Amato

Department Members

Adam L. Browser

Briana Enck

Sheryl P. Giugliano

Daniel L. McAuliffe

Russell H. Stern



BANKRUPTCY LAW ALERT

February 4, 2021

By: Michael S. Amato, Esq.
Sheryl P. Giugliano, Esq.

RMF
RUSKIN MOSCOU FALTISCHEK P.C.
Smart Counsel. Straight Talk.

Day Traders Provide Lifeline to Traditional Investors

The recent phenomenon of small traders, emboldened by social media outlets and day-trading apps, challenging more traditional hedge fund investors, has added a new wrinkle to the restructuring and bankruptcy arena – institutional equity holders in those companies are able to exit gracefully, without suffering the financial hit that many would have predicted just a few weeks ago.

AMC Entertainment Holdings Inc. has been struggling to avoid Chapter 11 as its theaters remain dark or substantially empty during the COVID 19 pandemic. Silver Lake Management, a private equity fund, provided millions of dollars in financing to AMC in recent months, and was the majority holder of AMC's convertible notes due 2026. Many in the restructuring community anticipated AMC's bankruptcy filing, and would have predicted potentially dire results for its equity holders in a bankruptcy. But the recent social media rally of AMC's stock permitted Silver Lake to exit its equity stake in AMC, converting bonds to equity and selling its shares in the movie theater chain, generating approximately \$113 million. Moreover, AMC reportedly recently raised new capital and allegedly is no longer in (imminent) danger of bankruptcy at all (Disclaimer: fundamental flaws remain constant for AMC and other brick-and-mortar based businesses, and recent events may not be indicative of AMC's future viability).

Macerich is a real estate investment trust and owns 52 shopping centers across the United States, including the Kings Plaza Shopping Center in Brooklyn and the Shops at North Bridge in Chicago. It has struggled in recent years as consumers transition to online shopping, and 2020's COVID-19 pandemic only deepened the hole for malls and their retail shops. Like AMC, a recent social media frenzy caused Macerich's shares to jump over 65% in four trading sessions. Ontario Teachers' Pension Plan, Macerich's largest shareholder holding 16.4% of the company, sold its entire holding of approximately 24.56 million shares for nearly \$500 million. Another example of a company's largest shareholder benefitting from the company's social media fueled stock rally, just as both of their fates seemed nearly sealed in a potential bankruptcy filing.

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In the cases of AMC and Macerich, large investors seized upon opportunities to exit their distressed investments. It remains unclear what long term impact social media driven day traders will have in the restructuring space, beyond giving some reprieve to large institutional shareholders at a time that they were anticipating losses. For now, we do not predict that the sudden uptick in share prices will lead to a slowdown for restructuring professionals, but savvy investors clearly reaped the benefits of this new phenomenon.

For more information, please contact:

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Bankruptcy Q&A: What Commercial Landlords Need To Know

By: Sheryl P. Giugliano, Esq.

One of your tenants files bankruptcy – now what? Bankruptcy proceedings are complicated, and consulting bankruptcy counsel early in the process will help commercial landlords avoid: (1) taking actions against the tenant or the premises that will violate applicable laws; and (2) missing important deadlines and opportunities to increase their recoveries. Below we offer a glimpse into some frequently asked questions, and encourage you to contact us for further discussions if you think any of this applies to one of your tenants.

1. What are a tenant's rights after filing bankruptcy with respect to a commercial lease of real property?

A tenant that files bankruptcy – i.e., a “debtor” – can (a) assume a lease and reorganize, (b) assume a lease and assign it to a buyer, or (c) reject a lease that it no longer deems valuable. Generally, in order to assume a lease, a tenant in bankruptcy will need to pay all amounts due to the landlord under the lease, and demonstrate its ability to perform under the lease going forward. If the lease will be assigned to a buyer, the tenant still needs to cure all defaults, but the buyer will need to establish its ability to perform under the lease. If the lease is for space located in a shopping center, the tenant (or proposed assignee/buyer) must satisfy additional requirements, including that the assumption (or assignment) will not disrupt the shopping center's tenant mix. When a tenant elects to reject a lease, it is essentially breaching the lease and triggering certain damages due to the landlord (these are explained in more detail below).

2. How long after filing bankruptcy does the tenant have to decide what to do with a commercial lease of real property?

Generally, a debtor has 120 days from the filing of its bankruptcy to decide whether to assume, assume and assign, or reject the lease. That time may be extended for an additional 90 days for a total of up to 210 days with bankruptcy court approval. Any further extensions require the commercial landlord's consent.

3. Can a commercial landlord collect rent from a tenant in bankruptcy?

Once a tenant files for bankruptcy protection a commercial landlord cannot collect unpaid rent that was due before the case was filed (if the tenant later decides to assume the lease, these amounts will be paid). But, generally, a commercial landlord is entitled to collect rent that is due after the bankruptcy filing. In some cases filed post-COVID-19, bankruptcy courts have granted a temporary deferral of a tenant's obligation to pay post-filing rent. This type of request is made by a tenant early in the process, and landlords should consult bankruptcy counsel early to preserve their rights.



4. When is it too late for a tenant to assume a lease during its bankruptcy case?

It is too late for a tenant to assume a lease during a bankruptcy case: (a) beyond the applicable time periods set forth above (generally 120 – 210 days after filing); (b) if that lease expired prior to the bankruptcy case being filed; or (c) if the lease was terminated under state law prior to the bankruptcy filing. In other words, a tenant cannot try to assume a lease that no longer exists.

5. If a landlord's lease is rejected during the bankruptcy case, is the landlord entitled to damages?

When a tenant rejects a lease, it is essentially breaching the lease and triggering damages due to the landlord. Upon rejection, a landlord may assert a claim for "rejection damages," which are capped at the greater of one year's rent or 15% of the rent for the remaining lease term, not to exceed three years' rent, plus unpaid pre-bankruptcy rent and additional rent. That cap does not apply to guarantors that did not also file for bankruptcy and guaranteed a tenant's obligations under the lease.

6. Can a landlord enforce an anti-assignment clause in the lease during the bankruptcy case to prevent its lease from being assumed?

Anti-assignment clauses or clauses that require a landlord's consent to assign are generally unenforceable in bankruptcy as a matter of public policy.

7. Can a landlord enforce a lease provision that provides for automatic termination of the lease upon a bankruptcy filing by a tenant?

These clauses are generally unenforceable under the Bankruptcy Code.

8. Can a landlord attempt to collect unpaid rent from a tenant, or continue or commence eviction proceedings against a tenant during a bankruptcy case?

The filing of a bankruptcy petition immediately gives rise to an "automatic stay," which generally prohibits any act to collect unpaid debt or to continue/commence any proceeding against the tenant (now a debtor). A landlord should obtain legal advice to discuss other methods of protecting its interests. For example, the automatic stay generally does not apply to third parties that did not also file bankruptcy, such as guarantors, or letters of credit (see below).

9. When can a landlord apply a security deposit to satisfy unpaid rent?

The answer depends on whether the deposit is in the form of cash or a letter of credit. In general, a landlord may not draw on a cash security deposit during the course of a bankruptcy case, but may draw on a letter of credit to satisfy amounts due. With court permission, a cash security deposit can usually be applied to offset unpaid rent that accrued before the bankruptcy filing.



10. Does a tenant have to perform its obligations under a commercial lease during the course of its bankruptcy case?

Yes. The Bankruptcy Code provides that the tenant must perform all post-bankruptcy obligations under a commercial lease until it assumes, rejects, or assumes and assigns the lease. Since COVID-19 has been impacting the economy, some tenants have been asking, and some bankruptcy courts have been granting extensions and deferrals of these obligations.

11. If the lease is rejected during the bankruptcy case, what is the procedure for receiving a distribution in the bankruptcy case?

If a lease is rejected, that means it will not be assumed, and there is no requirement to “cure” or pay the pre-bankruptcy filing amounts due. In that case, the landlord can file a proof of claim, along with supporting exhibits, with the bankruptcy court. Landlord’s should be careful to file these timely or they risk waiving their claims in the case. Bankruptcy counsel should be consulted to assist with preparing and filing a claim to ensure it is properly prepared and timely filed.

For additional information, please contact

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LAW ALERT

April 30, 2020

By: Michael S. Amato, Esq.

RMF
RUSKIN MOSCOU FALTISCHEK P.C.
Smart Counsel. Straight Talk.

SBA Publishes Additional Guidance and FAQ's on Eligibility for Paycheck Protection Program

Businesses reeling from the impact of the COVID-19 pandemic immediately utilized the initial resources committed to the Payroll Protection Program ("PPP"). Due to the demand for the resources, 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. However the Administration, Congress and the Small Business Association ("SBA") faced significant backlash over reports that many large, and in some cases publicly held organizations qualified for and obtained PPP funds, while many small businesses struggled to get applications filed and/or were shut out of the PPP entirely.

To address these and other issues that arose in the initial roll out of the PPP, on April 24, 2020, the SBA released an update to its interim rules and FAQ's relating to the PPP.

Hedge Funds-Private Equity

Pursuant to the interim rule, hedge funds and private equity firms are primarily engaged in investment or speculation, and are therefore ineligible to receive PPP loans. However, a portfolio company of a private equity fund may be eligible for a PPP loan if it otherwise qualifies. The affiliation rules under 13 CFR 121.301(f) apply to private equity-owned businesses in the same manner as any other business subject to outside ownership or control. However, the PPP waives the affiliation rules if the borrower receives financial assistance from an SBA-licensed Small Business Investment Company (SBIC) in any amount. This includes any type of financing listed in 13 CFR 107.50, such as loans, debt with equity features, equity, and guarantees. Affiliation is waived even if the borrower has investment from other non-SBIC investors.

Enhanced Scrutiny of PPP and Limited Safe Harbor for Return of PPP Funds

Public reaction to the administration of the PPP, as well as revelations that organizations that were not in distress or had other access to capital may have benefitted from the program to the exclusion of smaller, struggling enterprises, will result in enhanced scrutiny of the program.

The Borrower Application Form requires PPP applicants to certify that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." FAQ 31 provides that when making the "good faith" certification of necessity, borrowers must take into account their current business activity and their ability to access other sources of liquidity sufficient to support the ongoing operations of the company that is not detrimental to the company. Any borrower that applied for a PPP loan prior to the issuance of this regulation and repays the loan in full by May 7, 2020, will be deemed by SBA to have made the required certification in good faith.

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Impact of Bankruptcy Proceedings on Eligibility for PPP

Having determined the risk “unacceptably high”, the interim rule provides that a debtor in a bankruptcy proceeding, either at the time it submits the application or at any time before the loan is disbursed, is ineligible to receive a PPP loan. Further, the interim rule provides that if the owner of the applicant becomes a debtor in a bankruptcy proceeding after submitting a PPP application but before the loan is disbursed, it is the applicant’s obligation to notify the lender and request cancellation of the application. If the owner fails to notify the lender, it will be deemed an unauthorized use of PPP funds.

Public Hospitals

A public hospital that is otherwise eligible to receive a PPP loan as a business concern or nonprofit organization is eligible for a PPP loan if the hospital receives less than 50% of its funding from state or local government sources, exclusive of Medicaid.

Legal Gaming Enterprises

The interim rule provides that 13 CFR 120.110(g) is inapplicable to PPP loans. As such, legal gaming enterprises are eligible for a PPP loan. Not surprisingly, businesses that received illegal gaming revenue remain “categorically” ineligible.

Employee Stock Ownership Plans (ESOPs)

The interim rule provides that a business’ participation in an ESOP (as defined in 15 U.S.C. § 632(q)(6)) does not result in an “affiliation” between the business and the ESOP and the business may be eligible for PPP loans.

**For additional information, please contact
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LAW ALERT

March 25, 2020

By: Michael S. Amato, Esq.

RMF
RUSKIN MOSCOU FALTISCHEK P.C.
Smart Counsel. Straight Talk.

Restructuring and Bankruptcy Options to Save your Company from the Brink

On February 12, 2020, the Dow Jones industrial average crested at 29,551. The economy was considered strong notwithstanding the growing deficit, and unemployment hovered at approximately 3.5%. Fast forward less than three weeks to March 16, 2020, and business owners and consumers are facing the most significant global economic crisis since 2008.

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. Federal, state and local authorities have issued unprecedented directives closing schools, shuttering businesses, and directing people to remain in or near their homes in very small groups. The stock market has given back all of its Trump era gains, and new unemployment applications have surged as businesses are forced to furlough and lay-off employees.

The short and long term economic impact of COVID-19 may not fully manifest itself for months or years. In the meantime, business owners must take short and long term measures to protect, or salvage, their operations.

Current State of Affairs

The five days from March 16, 2020 to March 20, 2020 saw a succession of New York State executive orders directing “non-essential” businesses to operate first at half capacity, then 25% capacity and finally to close. Essential businesses include [1] :

- health care operations including, research and laboratory services, hospitals, walk-in-care health facilities, elder care and nursing homes;
- infrastructure including, utilities, telecommunications and data centers, airports/airlines; transportation; and hotels;
- manufacturing including food processing, medical supplies and equipment and items used in essential industries;
- retail including supermarkets, pharmacies, restaurants and bars (take out or delivery only), hardware and building;
- services including trash, mail, auto repair, child care, funeral homes;
- news media;
- financial institutions including banks, payroll, accounting and the markets;
- homeless shelters, food banks and human services providers;
- police, fire safety, security and enforcement;
- essential government services.

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



In addition, any business may submit a request to be included as an essential business, or for providing essential services to an essential entity providing essential services or functions to the Empire State Development Corporation at <https://esd.ny.gov/content/request-designation-essential-business-purposes-executive-order-2026>.

As a direct result of Executive Order 202.6, brick and mortar retailers, already reeling from several years of slowing sales, reduced mall and store traffic, and internet competition are closed. Bars and restaurants must try to subsist solely upon take-out and delivery sales. Salons, barbers, gyms and small retailers are closed.

Potential Relief

Federal, state and local governments are scrambling to prevent the economy from falling any farther, and looking to provide relief to beleaguered businesses and consumers. President Trump signed the Families First Coronavirus Response Act to increase protections for employees adversely affected by the pandemic. New York State followed suit with similar legislation - the New York Emergency Paid Sick Leave Act - designed to supplement, and not offset or replace, the federal legislation. It is noteworthy that while these programs may provide assistance to employees, it comes at a cost to their employers which may be offset in the form of tax credits.

Congress currently is working on a broader economic package, designed to help businesses and individuals. As of this writing, the final details of that legislation remain uncertain. In the meantime, the United States Small Business Administration ("SBA") has made Economic Injury Disaster Loans ("EID") available to qualifying businesses that have suffered a defined economic loss as a result of COVID-19. In the event that a business does not qualify for an EID loan, the SBA has alternatives available such as the 7(a) Loan Guarantee Program and the SBAexpress Loan. These programs may be beneficial to some but will only provide relief to small businesses, leaving mid-sized and larger companies little relief.

In addition to economic protection and stimulus, federal and state agencies have implemented measures to blunt the impact of COVID-19. For example, federal regulators have eased rules allowing banks and financial institutions more leeway in addressing debt. Loans that were not in default prior to the pandemic may be modified to extend terms, defer or forgive payments, reduce or forgive interest reduction or forgiveness without being re-characterized as "troubled debt restructurings." Federal tax filing deadlines have been extended to July 15, 2020. New York state has issued a moratorium on residential and commercial foreclosures.



Strategies to Protect your Business

Every business owner, operator and investor must confront the economic impact of COVID-19 on their business and investments. An out of court restructuring starts with a top to bottom review of business operations and is best effected with the assistance of one or more qualified restructuring professionals. In addition to his or her expertise and ability to analyze the business operations, a restructuring professional enhances credibility with lenders, regulators, trade creditors and employees. The professional should review financials, contracts, operations, staffing, leases, collective bargaining agreements and related materials and work with management to identify a going forward strategy. Most of all, the professional will prepare a reasonable cash flow projection through the immediate crisis.

Depending upon the analysis, the business owner may elect an out of court restructuring, sale of some or all the company's assets or divisions, or if the company is under immediate duress, a bankruptcy. If the company is addressing serious economic impact, but is able to operate and pay some or all of its obligations, an out of court restructuring should suffice. This strategy may include renegotiation of its existing lending facilities, restructure of the business operations, or negotiations with its vendors or suppliers.

The company may consider entering into a forbearance agreement with its secured lender to restructure its obligations. As set for the above, regulators may allow more leeway for lenders to restructure debt without requiring the lender to report the obligation as troubled debt restructuring. This may require providing additional collateral or security. Alternatively, the business may be eligible for an EID or other SBA program, some additional economic stimulus that may be forthcoming. It is likely that some or all of the anticipated legislation will make relief programs available, and additional liquidity available to struggling businesses.

If the business is unable to pay its obligations as they become due, or there is a pending catastrophic event that will significantly disrupt or shut down the business, such as a loan default resulting in a lack of access to working capital, a judgment being entered or executed upon, a default under an existing credit facility, or default under an existing contract or lease, then the business owner must consider a more aggressive remedy such as a bankruptcy filing or assignment for the benefit of creditors ("ABC").

An ABC is a creature of state statute. It permits the business owner to transfer some or all of its assets to an assignee who then liquidates assets for value, and makes a distribution to creditors. The assignment and sale requires state court approval. However, unlike a bankruptcy filing, the assets are not sold free and clear of liens, and the assignor does not receive a discharge of its obligations. If conducted properly, the state court will enter an order that the sale was commercially reasonable, which may preclude creditor claims that the sale of the assets was a fraudulent transfer.



The bankruptcy process can be utilized to effectuate a myriad of restructuring strategies. One of the most significant features of a bankruptcy filing is the automatic stay under the Bankruptcy Code. The automatic stay prohibits collection or enforcement of pre-filing rights. 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. The automatic stay provides the company with the breathing room necessary to restructure its operations. Liquidity may be obtained in the form of an equity investment or new credit facility. The company can use the bankruptcy process 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.

If restructuring is not feasible, the company can engage in an orderly liquidation in a bankruptcy proceeding. The company may sell some or all of its assets under § 363 of the Bankruptcy Code. The sale is conducted under the supervision of the Bankruptcy Court, and is subject to higher and better offers. Ultimately, the Bankruptcy Court will enter an order approving the transfer free of all existing liens, claims and encumbrances.

One of the most significant impediments to bankruptcy is the potential costs. To alleviate this problem, Congress recently enacted the Small Business Reorganization Act of 2019. The purpose of the Small Business Act was to decrease the economic and procedural burdens of Chapter 11. The Act applies to those companies with secured and unsecured debt under \$2,725,625.

Conclusion

The ultimate impact of COVID-19 will be measured in years and decades. Most business owners are facing zero or substantially reduced revenues, continued business obligations in the form of debt and rent payments and potentially increased labor and compliance costs. It is imperative that these owners implement immediate and aggressive strategies to combat the impact of the pandemic.

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Smart Counsel. Straight Talk.

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.

[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) restructure 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.



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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Representative Debtor Cases

Sheryl Giugliano

- Jesup & Lamont, Inc., 2010, USBC SDNY - broker dealer liquidation.
- Lighthouse Financial Services, LLC, 2011, USBC SDNY - broker dealer liquidation.
- Carol's Daughter Stores, 2012, USBC SDNY- hair care products company restructuring.
- Plum TV, 2012, USBC SDNY - upscale cable channel sale and restructuring.
- Korey Kay Partners, Inc., 2014, USBC EDNY - advertising company liquidation.
- Kangadis, dba Gourmet Foods, 2014, USBC EDNY - olive oil distribution company restructuring.
- Arlene Farkas, 2015, USBC SDNY - single asset real estate restructuring.
- NRAD Associates, 2015, USBC EDNY - radiation and radiology practice restructuring.
- Lebenthal, 2017, USBC SDNY - broker dealer liquidation.
- Pips Island Corp., 2020, USBC SDNY - children's live interactive entertainment liquidation.
- Ponderosa-State Energy, 2020, USBC SDNY - oil and gas exploration company restructuring.

Michael Amato

- Bill Blass Ltd., LLC
- Bleyer Industries, Inc.
- Boundless Corporation
- CDS Business Services, Inc.
- Cyberrebate.com, Inc.
- Eltron Supply, Ltd.
- FPSDA I, LLC
- (17 Dunkin Donuts/Baskin Robbins Franchises)
- Hampton Bay Diner Corp.
- Harvey Electronics, Inc.
- Interworks Systems, Inc.
- JJM-63 Restaurant Corp.
- John's Insulation, Inc.
- National Radiator, Inc.
- NY Inner City Chicken, Inc. d/b/a Popeye's Chicken
- Oliveira Contracting, Inc.
- Quadrozzi Concrete Corp.
- Quadrozzi Inc. d/b/a NYCEMCO
- R.F. Cunningham & Co., Inc.
- RJLL Corporation
- Searle Blatt & Co., Ltd./Tom Jones Inc.
- Southampton Brick & Tile, LLC
- The Robert Plan Corporation