

LIQUIDITY OPTIONS IN A COVID-19 ECONOMY

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Liquidity Challenges in Normal Times

- Overleverage
- Mismanagement
- Supply Chain Disruption
- Defaults by Customers/Tenants
- Uninsured or Legacy Liabilities
- Disadvantageous Contracts or Leases
- Industry Challenges Long-Term
- Industry Challenges Short-Term
- General or Regional Economic Problems

Additional Liquidity Challenges Due to COVID-19

- Forced and voluntary closures
- Slow pay receivables/customer bankruptcies
- Reduced ongoing revenue
- Supply chain issues
- Limitations on Certain Court Actions for Lenders and Landlords/REITs

Chapter 11 Players

- Chapter 11 Debtor in Possession
- Possible Trustee in Chapter 11 if they can make a strong showing of cause - Trustee automatically appointed in Chapters 7 and 13
- Possible Official Chapter 11 Committee
 - Unsecured Creditors - Need at least three (3) creditors willing to serve
 - Equityholders - Rare
 - Other Special Constituents (Tort Claimants, Retirees, etc.) - Rare
- Secured Creditors
- Office of the United States Trustee/Bankruptcy Administrator
- DIP Lender
- Other Creditors

Overview of In Court Options

- Chapter 11 (business or individuals with significant assets)
 - Reorganization
 - Going Concern sale
 - Orderly Liquidation
 - Easier rules for small business bankruptcies (less than \$7.5 million of debt)
- Chapter 7 (business or individual)
 - Fire sale liquidation/generally no business operations
 - Independent Trustee appointed
- Chapter 9 (municipalities and local governmental units)
- Chapter 13 (individual wage earners)
- Chapter 12 (family farmers)
- State or District Court Receivership

Overview of Out of Court Options

- Pre-Negotiation and Forbearance Agreements
- Out of Court Workouts/Amendment
- Creditors Composition
- Exchange Offer
- Asset Sale
- Assignment for the Benefit of Creditors
- State Law Dissolution

Borrower/Lender Issues

- Being constructive versus confrontational
- Evaluation of current security - consider additional collateral and guaranties
- Shoring up existing provisions (inspections, discussions with officers and accountants, etc.)
- New cash contributions/loans and priority
- Additional reporting/more frequent reporting
- Short-term and long-term adjustments
- Permitting additional indebtedness
- Additional fees/interest rate increase

Borrower/Lender Issues

- Ongoing Borrowing/Borrowing Base
- Evaluation of representations and covenants to address potential issues
- Updating budgets and projections
- PIK interest and fees, or deferral thereof
- Extending payment terms
- Cash Management
- Audited financial statements
- Evaluate foreclosure options for real and personal property collateral
- Intercreditor Agreements
- Potential cramdown of secured claims in Chapter 11

Customer/Supplier Issues

- Ongoing supply relationship
 - Long Term Contract
 - Series of Purchase Orders
- Timing of payments of receivables
- Payment plans and minimizing future preference risk
- Credits and deducts
- Recoupment versus setoff versus no mutuality
- Reclamation of Goods (45 days) and Replevin
- 20 Day Priority Claim in Bankruptcy for Goods

Landlord/Tenant Issues

- I. Pre-Bankruptcy
 - Past Due Rent/Payment Plan
 - Preference Risk for Past Due Rent
 - Landlord Self-Help/Lockout
 - Access to Eviction Court
 - Lease guarantors/security deposits/letters of credit

Landlord/Tenant Issues

II. In Bankruptcy

- Traditional post-petition rent rules
- Recent attempts to defer post-petition rent payment
- Decision period for assumption or rejection
- Assumption
- Assumption and assignment/lease designation rights
- Cure Costs
- Rejection
- Rejection Damage Cap
- Threat of rejection to modify lease on emergence

Officer/Director/Equity Sponsor Issues

- Fiduciary duty to creditors and others
- Guarantees
- Trust Fund taxes
- Employee wages
- Prior distributions and dividends
- Directors who authorized prior distributions and dividends
- Aiding and abetting fraudulent transfer
- Successor Liability
- Insurance coverage and tail coverage

Insurance Issues

- Insurance renewals and related certifications
- D&O and E&O insurance
- Insurance coverage implicated in mass torts
- Bankruptcy as forum to settle coverage disputes
- Bankruptcy as forum for liquidating pending and future claims
- Primary versus excess insurer dynamics
- Multiple defendants (certain environmental, mass torts, etc.) with overlapping insurance coverage

Conclusion

- When, not if, regarding further economic impacts
- Government loan forgiveness conditions
- Deferred rent
- Deferred payables
- Deferred debt amortization
- Loan to own strategies/debt trading