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COVID-19: Protecting Your Business from Distress

Q: AS BUSINESS OWNERS GRAPPLE WITH THE UNCERTAINTIES CAUSED BY THE COVID-19 PANDEMIC, COULD YOU OUTLINE A “TO DO” CHECKLIST?

JOHN G. LOUGHNANE: There are five keys for resilient owners: 1) Focus on cash—ensure you have a 13-week cash flow projection; 2) Protect the core by prioritizing the most profitable activity; 3) Identify potential critical vendor/customer problems and solve them efficiently; 4) Be prepared to pivot in order to navigate change effectively; and 5) Understand rights and obligations, and the consequences of another party’s failure to perform.

Q: WHAT COMMON PITFALL SHOULD BUSINESS OWNERS AVOID?

JGL: Denial is the most common pitfall and must be avoided. Indeed, denial of a business challenge can wreak havoc on even the most successful companies. Denial may take the form of ignoring the implications of financial difficulties experienced by a key vendor or customer. More broadly, denial may consist of ignoring fundamental shifts in customer demand for particular goods or services. Business owners must stay alert to a variety of threats even in the best of times. In a period of economic distress, owners must not only be alert—they must be prepared to take decisive action to guard against financial contagion.

Cybersecurity is a perfect example. A company may have taken all appropriate action with respect to protecting its own assets from cyberattack. Yet, such actions will be of little consequence if the company has shared key data with a firm whose distress creates threats to that data as a result of reduced resources and distraction. Denial of the potential impact of this type of threat would be dangerous and potentially devastating. Thus, without question, denial is a pitfall to avoid. Resilience requires both alertness and the ability to take thoughtful action on a timely basis.

Q: DO YOU HAVE TIPS ON MESSAGING TO EMPLOYEES, VENDORS, CUSTOMERS, LANDLORDS, AND OTHER IMPORTANT STAKEHOLDERS?

JGL: Communication is critical. Business owners should understand not only the material terms and conditions of key contracts, but also the key interests of all stakeholders. If existing contracts no longer serve the mutual interests of the parties, then consideration should be given to amending or revising the contracts in an appropriate way to better align the parties for a beneficial relationship. In some cases, unfortunately, the parties have inadequate contracts that do not help guide productive conduct in distressed circumstances. If not remedied, one party may retreat into a corner adopting an interpretation supporting its position—that a court may or may not agree with much further down the road. Business people interested in solving business problems should view contracts as a means of creating value, not destroying it.

Q: WHAT OPTIONS EXIST FOR BUSINESS OWNERS TO WITHSTAND THE FINANCIAL CHALLENGES OF TRADING PARTNERS?

JGL: Business owners need to understand the rules that apply to the situation at hand. For example, a company may have a contract with a key vendor to supply certain goods or services. Although the contract may have set forth the parties’ rights and responsibilities at the outset of the deal in fine detail, if the supplier is suffering under the economics of the deal, one option for the supplier if forced into a bankruptcy proceeding is to reject (shed) the contract—leaving the counterparty with just a mere bankruptcy rejection claim and no source of supplies.

Business owners need to understand the range of proceedings that a distressed counterparty may become entangled in (whether in court or out of court) and how those proceedings could materially impact that owner’s own business. Time is money in all such proceedings, with the real possibility of economic harm to those not taking appropriate action to preserve rights. Oftentimes distressed situations can be solved outside of any such proceedings. Significant time and expense can be saved by acting proactively to head off and combat the distress of others.



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