CorporateLiveWire

BANKRUPTCY & RESTRUCTURING 2021

EXPERT GUIDE

www.corporatelivewire.com

THE NEW GERMAN RESTRUCTURING SCHEME

LANDMARK MOMENT IN GERMAN RESTRUCTURING PRACTICE? - P18

CHAPTER 11 VALUATION ISSUES:

VALUE IS IN THE EYE OF THE BEHOLDER - P36

PROVISIONAL LIQUIDATION IN BERMUDA

AND THE SELECTION OF PROVISIONAL LIQUIDATORS - P14

SELWYN D. WHITEHEAD, ESQ.

ON HELPING OUR CLIENTS STAY AFLOAT AND GET PAST THE COVID-19 TSUNAMI - P22

APPLEBY | Pantalica Partners | Brinkmann & Partner | R&H Restructuring | WGH Winthrop Golubow Hollander

Helping our clients stay afloat and get past the COVID-19 tsunami

By Selwyn D. Whitehead, Esq.

Selwyn D. Whitehead, Esq.
USA

www.selwynwhitehead.com
+1 (888) 599 0504
selwyn@selwynwhitehead.com

There are three key contract-related COVID-19 economic survival tactics small business owners and their counsel need to at least consider making a part of the long term strategic plan to keep the business afloat until we get past this pandemic. They are a working knowledge of:

1. How to defend the business when, not if, it faces eviction from its commercial leasehold for nonpayment of rent after being shut down by the government to protect the public;
2. How to challenge the business's insurance carrier after the carrier denies a business interruption claim; and,
3. The pros and cons of filing for bankruptcy court protection in order to deal with the financial issues brought on by the pandemic.

Beginning in March 2020, with the onset of COVID-19, I began hearing from small business owners wanting guidance on what they should consider in their efforts to keep their businesses afloat after their local government issued lockdown mandates in efforts to retard the community spread of the Coronavirus. All of the businesses that reached out to me had one thing in common: they were tenants in a commercial building with landlords demanding the immediate payment of all outstanding rents along with some form of guarantee of timely future payments. However, these small business owners simply could no longer pay their contract rents because the COVID-19-related lockdowns had resulted in a substantial loss of business income.

In response to their enquiries, I suggested that these business owners needed to consider undertaking the following three tactics that might provide them with some relief.

Firstly, I suggested that as a tenant in a commercial property with a still in effect executory lease, the business owner should look to their commercial rental contract to see if it contains *a force majeure provision,* which literally means that *an act of God* is preventing the business owner from performing her duties and obligations under the rental contract, such as timely paying the rent each month. Please note that "an act of God" normally also includes the lawful orders of duly appointed or elected governmental officials or acts of civil unrest.

In layperson's language, a *force majeure* provision in a rental or lease agreement, as interpreted by a court of competent jurisdiction – the ultimate arbiter of a formal legal dispute between the parties to a contract – may lead that court to find that due to a well-articulated defence to an eviction action commenced by the landlord for nonpayment or a finding as the result of a request for a declaratory judgment presented by the tenant, supported by either (a) clear contractual language or (b) the documented conduct of the landlord and tenant related to the contract showing a definite pattern or practice between the parties where the parties are not paying or receiving rent for the past several months, backed up with the requisite proof; the business owner is legally relieved of the duty to pay some or all of the contract rent. Similarly, that court may also find that the forced governmental shutdown so *frustrates the purpose* of the rental contract that both parties should be excused any further performance under its terms.

For example, say, the City and County of San Francisco as a prophylactic measure reasonably believed to be necessary to stave off the community spread of COVID-19, mandates that all restaurants, including the one owned and operated by Millie, a self-taught restaurateur and her family who have worked hard and spent the last 40 years building up the restaurant to the point where prior to the pandemic it consistently produced enough income to support not only Millie and her husband, their children and grandchildren, but also their 50 full and part-time employees. After the shut down order, Millie has had the choice of either closing down completely, or serve her customers via take out and curbside pickup only, which she decided to do. However, Millie's modified plan of operation has generated only $14,710.88 per month in total income, a 90% drop in her average pre-pandemic monthly income of $147,108.84.[1] But then, Millie's *triple net lease* calls for monthly payments of $25,000, which due to the lockdown mandate, she simply cannot make. And as a result, her landlord is making noises about an eviction. Under the hypothetical presented, if the landlord goes ahead and files the threatened eviction proceeding and the *force majeure* provision in lease were found to be robust enough, the presiding court may find that Millie is legally relieved of her duty to pay some or all of her rent for a period time to be determined by the court.

1. $147,108.84 is the average monthly income of the 859 restaurateurs who responded to a survey conducted in 2018, by Toast, Inc. the cloud-based restaurant software company based in Boston, Massachusetts. The company provides a restaurant management and point of sale (POS) system built on the Android operating system. Toast was founded in Cambridge, Massachusetts.

And even if there is no *force majeure provision* in the lease, a court may find that under the circumstances Millie may be relieved of paying some or all of her rent, because to have to pay the $25,000 per month rent out of only $14,710.88 income would be *impossible and/or impracticable*. Likewise, the court may find that the lockdown mandate so *frustrates the purpose* of the lease – to provide an indoor fine dining white-linen-table-cloth experience to high income customers – that the lease contract no longer serves any meaningful commercial purpose and is therefore effectively moot. Further, if Millie could show the court that the contract's *ambiguity* or the lack of clarity or imprecision as to the meaning of a material term or clause, renderers the contract objectively and subjectively *too vague* for reasonable interpretation. And finally, if Millie could convince the court that the contract contains terms so oppressive to her, the party in the less powerful negotiating position, that she basically had to take the contract or leave it as authored by the landlord, rendering it an *unconscionable contract of adhesion*. All four are *defences to Millie's landlord's claim that she breached the rental contract*. And once Millie's counsel has made the implications of these defences clear to the landlord, they may provide Millie with the leverage needed to negotiate a modification of the terms of the existing lease to include a short-term rent abatement, or a long-term rent reduction, or a walk-away free and clear lease termination right, or all three provisions.

Secondly, I suggest that the small business owner needs to thoroughly review their business insurance policy to familiarise themselves with the contours of the *business interruption coverage, if any*, or what in Millie's case, she believed was business interruption insurance. All Millie knows is that she paid a large premium for something her agent or broker called a *business interruption rider* that she believed would replace her lost business income *and* provide her with funds for the additional expenses she would incur when a covered event occurred, the way her insurer had paid her wine supplier, *Too High up on the Vine Vineyards*, in Napa County after his winery brunt down and smoke destroyed his crop of Zinfandel Grapes in the Wine Country Firestorm of 2017.

If a business owner has the appropriate business interruption policy, it may form the only real basis to keep a small business afloat during these troubling times. Unfortunately, Millie should know that her insurer will likely very quickly deny her claim. So, that means Millie may have to sue her insurer to enforce the business interruption payment terms of the policy, if any. And Millie should know from the get-go that it will be an uphill battle because the nature of the provisioning of insurance in America, which by design is geared towards increasing the insurer's bottom line by keeping its outlays to satisfy claims as low as legally possible. Insurers are fighting with hammer and thong against the approximately 1,700 pending COVID-19 related business interruption claims lawsuits that were filed in the United States since 2020 because of something the insurance industry learned during the last bouts of viral infections to hit our society, including: The 2002-2004 severe acute respiratory syndrome (SARS) outbreak; The (H1N1) flu pandemic back in 2009; and the 2014-2016 Ebola outbreak.

What do these three past viral infections have in common: They are viral and/or bacterial and/or fungus infections that are spread human to human (or sometimes from other species) by airborne aerosol droplets, human to human physical contract, or by human contact with human or animal waste. Also, theses virus or bacteria or fungus *are not spread or related* to any specific instance of physical damage to a premise or other insurable property. And as a result of the fact that these viral infections that cost them huge payouts in the aforementioned previous events, insurers started *excluding* from their product offerings any losses that are not directly related to physical damage to the insured's premises. And as an added prophylactic measure, insurers started issuing and renewing policies with terminology specifically excluding any kind of loss related to viruses, bacterium or fungi.

So, unless insureds such as Millie's have what is known as and truly is an *ALL RISK Policy* – which according to *Investopedia*, is a type of property and casualty insurance coverage that automatically covers any risk that the contract does not *explicitly omit* – her insurer will deny coverage. For example, if an "all risk" homeowner's policy does not expressly exclude flood coverage, which most do, then the house will be covered in the event of flood damage.

To determine what is or is not included in her policy, Millie will need to go through it to locate her *Schedules of Forms and Endorsements*, looking for a form entitled *Business Income and Extra Expenses Coverage Form*, or some similar title. And then she must look for *exclusion forms*, such as a form entitled *Exclusion of Loss Due to Virus or Bacteria* and/or *Fungi or Bacteria Exclusion*. Whether she can find these documents or not, I suggest Millie consult with an attorney who is knowledgeable about insurance to walk her through her policy to determine what it does or does not cover.

Because an insurance policy is a form of contract between Millie and her insurer, if Millie decides to sue her insurance company, she will allege her claims for loss due to the insurer's breach of its duties under the contract for not paying out on her claim for business interruption and extra expenses that she thought she paid for as part of her premium. And once the parties engaged in a legal battle, Millie and her insurer will muster all the claims and defences they believe they are entitle to, including a new one available to insurance policy holders; Millie's claim of bad faith on the part of the insurer. Insurance bad faith is a legal term of art that describes a civil wrong, other than a breach of contract, committed by an insurer against its insured that harms or injures the insured, while said insurer is acting in it capacity as the insured's fiduciary. The basis of the claim is that under U.S. common law, insurance companies owe a duty of good faith and fair dealing to the persons they insure. This duty is often referred to as the "implied covenant of good faith and fair dealing" which automatically exists by operation of law in every insurance contract.

And finally, the third tactic; the economically distressed business owner needs to consult with a knowledgeable bankruptcy attorney to discuss the pros and cons of filing for bankruptcy. If the bankruptcy option is chosen, the business owner will obtain the protection of a federal court in equity, the United States Bankruptcy Court, while the owner tries to either save the business through reorganisation or shut it down permanently through an orderly court-supervised liquidation and then get on with his/her life by starting a new business or getting a job or both.

Business owners should know that one of the Bankruptcy Court's most powerful business rehabilitation tools in a reorganisation case is the court's ability to rewrite and modify existing contracts between debtors and creditors. As such, with the right advocacy and sufficient evidence, once under its protection and as part of her business' plan of reorganisation, Millie may be able to convince the bankruptcy court judge to modify or rewrite her commercial lease with her landlord and/or compel her insurer to make good on her insurance policy.

And just as importantly, Millie may, while under the protection of the Bankruptcy Court, gain the time she needs to apply to the U.S. Small Business Administration for funds under its brand new grants programme, the Restaurant Revitalization Fund[2], which effective 3 May 2021, will provide emergency financial assistance to eligible restaurants, bars, and other qualifying businesses impacted by COVID-19. Any targeted business can begin the application process on the effective date, and all should; however, for the first 21 days of the programme the SBA will only fund applications "where the applicant has self-certified that it meets the eligibility requirement for a small business owned by women, veterans, or socially and economically disadvantaged individuals." So, I recommend that Millie and others go to https://www.sba.gov/funding-programs/loans/covid-19-relief-options/restaurant-revitalization-fund for more information and instructions on how to apply for these business-sustaining funds.

2. The American Rescue Plan Act established the Restaurant Revitalization Fund (RRF) to provide funding to help restaurants and other eligible businesses keep their doors open. This program will provide restaurants with funding equal to their pandemic-related revenue loss up to $10 million per business and no more than $5 million per physical location. Recipients are not required to repay the funding as long as funds are used for eligible uses no later than 11 March 2023.

Selwyn D. Whitehead Esq. [JD, LLM Tax Law, LLM IP Law, California Bar Bankruptcy Law Certified Specialist] is a San Francisco Bay Area bankruptcy and tax attorney whose practice focuses on helping her clients manage their wealth through effective estate and tax planning and/or manage their debt through debt restructuring or bankruptcy. Selwyn also helps her clients facing foreclosure and represents clients with emotionally and financially "taxing" issues before the Franchise Tax Board, the IRS and the U.S. Tax Court.

Selwyn also produces and hosts her weekly talk show, SELWYN'S LAW, which discusses the law as related to consumer and small business finance airing Saturday mornings at 10:00 AM on the Christian Radio Station KFAX, located at AM 1100, whose broadcast footprint includes the San Francisco Bay Area and nationwide on the Internet. And beginning in April 2020, Selwyn expanded the reach of SELWYN'S LAW when her show was picked up by World-Wide Christian Radio, WWCR, which rebroadcasts her shows world-wide over short-wave on Friday afternoons.