



**Covid-19**

UPDATE:  
June 9, 2020

**Coronavirus / COVID-19  
Response Team**

MILLER   
JOHNSON  
Attorneys

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MILLER   
JOHNSON  
Attorneys

**My Supplier / Customer  
Filed Bankruptcy –  
Now What?**

» Loic Dimithe  
John Piggins

MILLER   
JOHNSON  
Attorneys

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## Today's Topics

- In the wake of the COVID-19 pandemic, we often are asked what our clients should do if a vendor or customer is suffering distress and may be contemplating filing for bankruptcy.
- It is impossible to anticipate every potential scenario, but there are several general “do’s and don’ts” to consider.
- Recognizing that the facts and circumstances differ as to each situation, it is best to consult your restructuring advisors as soon as possible if you believe a customer or vendor is suffering financial distress and may be close to bankruptcy.

## Distressed Customers

## Monitor Receivables

- Monitor receivables diligently, and take note of the following:
  - Increases in the time between invoicing and payment; and
  - Requests for extensions or other accommodations of payment terms.
- Be aware of preference treatment.
  - If you are owed money, then you should collect.

## Defenses to Preferential Treatment

- **Contemporaneous Exchange:** Protects payments made at or near the same time that the creditor provided equal value in goods or services.
- **Ordinary Course of Business:** Prevents recovery of payments made in the parties' ordinary course of business, or according to ordinary business terms.
- **New Value:** A creditor that can show that it delivered new goods or services to the customer after receiving alleged preference payments may be able to set off the value of such new goods and services against any preferential payments.

## Contract Rights

- Review governing agreements, contracts, POs and other relevant documents.
- Pay special attention to the remedies, notices and cure periods following a customer default.
  - Terminating a contract before the customer files for bankruptcy may be a game changer.

## Contract Renegotiation

- Consider modifying contractual terms:
  - Impose credit limits.
  - Consider requiring cash on delivery or pre-payment for all products/services. Also consider customer deposits.
  - Demand a PMSI on any sold good.

## Statutory Rights

- **Goods in Transit:** Consider exercising the right of stoppage of delivery.
- **Reclamation Rights:** If the distressed customer has received delivery of the goods within the last ten days, or if you received a representation of the customer's solvency within the last three months, you may have a right to reclaim the goods.

## Statutory Rights (cont.)

- **Adequate Assurance:** Consider demanding guarantees, liens, security deposits, letter of credit or any other payment protection.
- **Statutory Liens:** Consider whether you can exercise any statutory liens (*e.g.* mechanic's liens, tooling liens, artisan's liens, landlord's liens or shipper's liens).

## Exercise Remedies

- If a customer does not pay as required or demanded, consider the following:
  - Refusing to supply further goods or services;
  - Changing payment terms (if permitted);
  - Terminating any existing contracts.
- You want to consider balancing collection pressure with maintaining the relationship you have with your customer.
  - Note that an intervening bankruptcy changes the dynamic regardless of your longstanding customer relationship.

## Bankruptcy

- Consult with legal counsel immediately.
- Beware the Automatic Stay, which prohibits:
  - Attempts to collect pre-petition debts;
  - Commencement or continuation of judicial or other proceedings to collect pre-petition debts (e.g., foreclosure, garnishment); and
  - Efforts to create, perfect or enforce liens on property of the estate or of the debtor, if relating to a pre-petition claim.
- Intentional violators may be subject to hefty fines and penalties.

## Bankruptcy (cont.)

- Take stock of all executory contracts.
  - Typically described as contracts where performance is due and owing on both sides, such that a breach by one party will excuse performance by the other party.
  - Automatic Stay precludes the termination of executory contracts.
  - Before continuing to do business with the debtor, you should understand whether it has authority to use cash from its lender(s) to pay for your goods and services.



## Bankruptcy (cont.)

- Take note of any deadlines.
  - Priority treatment for goods delivered to the customer within 20 days before the bankruptcy filing.
  - Timely file all proof of claims for any amounts owed.
- Seek “critical” supplier status, which allows a debtor to pay certain key providers all or a portion of their prepetition claims, usually in return for continued products or services.

## Distressed Suppliers



## Communicate

- Understand the cause of the supplier's financial distress and determine if you want to provide support (e.g. accelerating payments to a supplier experiencing liquidity issues).
- Determine if (and for how long) the supplier intends to continue supplying parts and whether it plans to reorganize and continue operating or liquidate and close its doors.
- Confirm with the supplier that it has the raw materials on hand to meet upcoming orders, whether all of its sub-suppliers are continuing to supply, etc.

## Evaluate Existing Supply Chain

- Identify the current inventory, parts, products or other good ("Products") on-hand at your location and at the supplier, and explore creating an inventory buffer to mitigate supply disruptions.
- Determine how quickly your production will be impacted if the supply of Products is interrupted.
- Determine what rights you have to use an alternative supply source.
- Determine how quickly and how feasible it would be to resource production.

## Alternative Suppliers

- Identify alternative sources of supply, regardless of whether resourcing is necessary or imminent.
  - Consider dual sourcing (e.g. 80/20).
  - Keep in mind your rights, or lack thereof, in any essential intellectual property.
- Identify how quickly the alternate sources of supply can be up and running.
- Identify the incremental costs associated with the alternate source of supply.

## Bankruptcy

- Determine whether the bankrupt supplier has entered into an Accommodation Agreement with any of its other customers and decide whether you should join any existing Accommodation Agreements or enter into a separate Accommodation Agreement.
- Keep a record of incremental costs that you incur and review whether you have any claim for damages against the bankrupt supplier.

## Payables

- Freeze payable to the bankrupt supplier pending confirmation that the supplier will continue to make and ship Products.
- This ensures that you will not lose any leverage you may have to negotiate with the bankrupt supplier or its lender to continue supplying your Products or produce any necessary bank.
- You may also be able to take advantage of recoupment or offset rights.

## Assess the Impact on your Business

- If the bankrupt supplier is critical or a large volume supplier, ascertain whether a representative (either an employee or an independent consultant) should be on site at the bankrupt supplier's production facility.
- Consider whether an access Agreement, which would grant limited access to the bankruptcy supplier's facilities, is warranted.

## Practical Advice

## Practical Advice

- Do your own diligence. Although rumors of financial distress are sometimes false, you should follow press coverage and monitor industry distress.
- Take note of unusual behavior such as:
  - large order,
  - changes in payment methods,
  - Changes in senior management or the hiring of restructuring advisors or the appointment of a chief restructuring officer), or
  - Changes in the client relationship.

## Practical Advice (cont.)

- Avoid long-term contracts and customer concentration issues with distressed customers.
- Contact counsel immediately if a customer or vendor files for bankruptcy.
- Be creative. This is the time for creative approaches and solutions.

## Practical Advice (cont.)

- Modify billing practices, such as:
  - Accelerate billings; and
  - Follow up regularly.
- Consider alternative dispute resolutions options.



**Loic Dimithe**

616.831.1785

[dimithe@millerjohnson.com](mailto:dimithe@millerjohnson.com)



**John Piggins**

616.831.1793

[pigginsj@millerjohnson.com](mailto:pigginsj@millerjohnson.com)

[millerjohnson.com](http://millerjohnson.com)

45 Ottawa Ave SW  
Suite 1100  
Grand Rapids, MI 49503

100 W Michigan Ave  
Suite 200  
Kalamazoo, MI 49007

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## PPP Compliance Readiness Program

Miller Johnson's interdisciplinary team of corporate and litigation attorneys will work with you to identify and gather relevant documents and performance data to ensure your business is best positioned to comply with the ever-changing rules governing the Paycheck Protection Program (PPP) and any resulting inquiry or investigation related to your business's application for, and receipt of, PPP funds.

### Services

- Assist with identifying and compiling records and performance data to support the good faith "need certification" made at the time the PPP loan application was made.
- Review use and accounting of funds to support your application for loan forgiveness.
- Compliance assessment based on review of information received.
- Advise on best practices and evolving rules and guidance related to the PPP.
- Development of audit preparedness plan.
- Advise on enforcement defenses and evidentiary support for the same.

\*Legal services related to responding to, or otherwise participating in, an informal or formal inquiry, investigation, audit or any other enforcement action (collectively, "PPP Enforcement Action") are excluded from the scope of legal services offered in this Compliance Readiness Program. However, in the event your business is required to respond to, or otherwise participate in, a PPP Enforcement Action, Miller Johnson will credit 50% of the Flat Fee paid for the Compliance Readiness Program against the cost of advising and representing your business with respect to any PPP Enforcement Action.

### Learn More

For more program information and enrollment, please contact Max Barnes or Jeff Muth.

**Max Barnes**  
Corporate  
(616) 831-1725  
[barnes@millerjohnson.com](mailto:barnes@millerjohnson.com)

**Jeff Muth**  
Litigation  
(616) 831-1706  
[muthj@millerjohnson.com](mailto:muthj@millerjohnson.com)

### Pricing

Flat Fee\* based on amount of PPP loan.

**\$5,000**  
Loan amount of \$2MM+

**\$5,500**  
Loan amount between \$1MM - \$1,999,999

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Loan amount between \$500K - \$999K

**\$2,000**  
Loan amount between \$250K - \$499K

**\$1,500**  
Loan amount less than \$250K.

Grand Rapids (616) 831-1700

Kalamazoo (269) 226-2950

[info@millerjohnson.com](mailto:info@millerjohnson.com)

[www.millerjohnson.com](http://www.millerjohnson.com)

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## Back to Work Resource Center

<https://resources.millerjohnson.com/>

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Resource Center

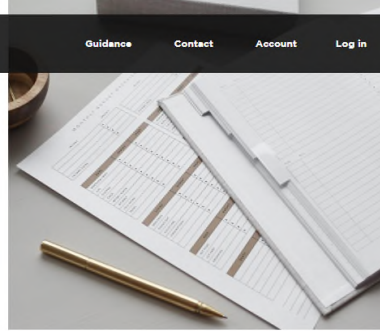
Guidance Contact Account Log in

Our **Back to Work Resource Center** provides a single source option for employers who are wrestling with the legal and practical consequences of a changed world.

For less than the cost of a typical handbook update, you gain access to an extensive collection of resources and Miller Johnson work product that we are confident will provide meaningful support to your efforts to navigate waters that are not only choppy but continuously changing direction.

Here is a sampling of what subscribers will find:

- Forms, Plans and Policies - we have drafted templates for you to put into service immediately
- Practical Guidance - tools to effectively, safely and confidently return to work incorporating best practices from outside organizations, including community partners such as Spectrum Health
- Industry Specific Guidance - pages devoted to industries singled



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