You Will Survive! How Your Business Will Survive Coronavirus – a Crisis Management Plan

March 18, 2020 / By Jonathan Friedland and Kyle Fleck

5 Steps Your Business Should Take During the Outbreak

COVID-19 has already decimated stock markets around the globe. On March 16th, the Dow Jones Industrial Average fell nearly 3,000 points, the highest percentage decline since the infamous "Black Monday" crash of 1987. While the Dow recovered by about one-third yesterday, it gave those gains back today. As of this writing, it and all major U.S. indexes are down by about one-third in the past 30 days, and the markets will likely yo-yo their way down further before stabilizing.

Ironically, and serving as a double whammy, the corona crisis is also preventing the industries most suited to benefit from the oil price war from being able to do so. Instead, falling oil prices[i] serve only to put additional pressure on domestic industries that benefit from (indeed, rely on) higher oil prices[ii]. The cancellation of events and closing of businesses requiring people to gather in even modest numbers (sporting events, theater, bars and restaurants–the list goes on) would have been enough to have a disastrous impact on businesses small and large—in very short order. The situation is far more extreme, of course, with many communities across the United States on virtual lockdown as of the date of this article.

COVID-19 had already caused systemic interruptions to the supply chain of 75% of American companies, even before the virus had a chance to establish a real stranglehold on the health of our nation. Businesses must enter crisis management mode as the certainty of more economic slowdown is 100%, and the U.S. braces for widespread vectors of transmission.

The fact that all this comes at a time when corporate debt ($13.5 trillion worldwide) stands at a record high isn't exactly a good thing. Moreover, given the hit to personal wealth that has already occurred in the form of stock market declines, owners of private businesses will be hard pressed to borrow from their personal net worth to help prop up their businesses[iii].

In the face of all this: a trillion-dollar federal stimulus package, supplemented by many state, local, and private efforts, has already been announced. And while the response to COVID-19 begins to take shape, the question is: will this be enough?

Opportunity Amidst Crisis

While most businesses will suffer, and many will fail, yours can survive. Most will.

And, when your business does survive, it can emerge to take advantage of what by then will be a large pent up demand for goods and services of all kinds—much in the same way that the end of World War II helped to create the postwar economic expansion.

There are five general actions you should take immediately to position your business as one that will not only survive this crisis, but which will thrive when it is over:

1. Conserve your cash.
2. Review your insurance policies.
3. Stay informed about government stimulus programs.
4. Review burdensome contracts for provisions that will excuse your performance.
5. Don't stick your head in the sand.

Your Crisis Management Plan

1. Conserve Cash

The expression "cash is king" is a guiding principle for many involved in finance and all involved in working with financially troubled businesses[iv]. Today, this sentiment has never been more true because for many businesses, the cash (and cash equivalents) they have currently will represent the maximum amount of cash they will have for a while. This is one reason that the major U.S. banks that were funding massive credit draws all moved to put their stock repurchasing programs on hold–to conserve cash[v]. This is true for solvent and distressed businesses alike[vi].

To put a finer point on it, it has never been more imperative to monitor and conserve your cash to emphasize liquidity and maintain a level of flexibility and security in these turbulent times. Indeed, consider accessing any untapped credit lines you may have. Starting to seek new credit is also a prudent measure.

2. Review Your Insurance Policies

Dig out your insurance policies, and if you don't have them, then be sure to contact your insurance agent or broker ASAP to get them. Here are some things to look for as you review your policies:

Business Interruption Insurance

Business interruption insurance ("BII") is insurance under which the insured is protected in the earnings which the insured would have enjoyed had there been no interruption of business.

In general, there are two types of BII: traditional and contingent coverage. Traditional BII coverage protects business from loss of income resulting from disruptions in their operations. On the other hand, contingent BII provides coverage for financial losses resulting from disruptions to a business's customers or suppliers. In either case, BII coverage typically requires a "direct physical loss of or damage to" insured property.

Of course, whether a communicable disease such as COVID-19 will be covered under either traditional or contingent BII is subject to the precise language of each policy. However, there is precedent that has found that disease can rise to the level of physical loss[vii].

Trade Disruption Insurance
Trade disruption insurance ("TDI") covers the consequential loss that results from a loss of earnings, extra expenses and contractual penalties incurred because of delays or disruptions in trade flows. TDI differs from BII coverage in that it does not require that there be a direct physical loss to goods or their conveyances.

Infectious disease policies are a type of trade disruption coverage that are designed specifically to protect companies from the financial impact and additional expenses incurred as a result of an outbreak-driven interruption. However, these are not standard and must be specifically bargained for. Additionally, there must be a corresponding loss of income as a result of an interruption. If these conditions are met, however, businesses may be reimbursed for a pre-negotiated period following the notification, reducing risk and mitigating unexpected financial loss.

Civil Authority Coverage
Civil authority coverage exists in property policies and provides coverage where a civil authority (i.e., a government) prohibits or impairs access to the policyholder's premises. Additionally, this coverage typically requires that the restriction to access of the property arose from "physical loss," though the physical loss does not necessarily have to occur on the policyholder's own property.

Event insurance, which is predominantly relevant to the travel and entertainment industry, transfers the risk to the insurer if an event has to be cancelled or postponed due to an occurrence "outside the control" of the policy holder.

These policies, however, typically provide that the mere threat or fear of an occurrence is not sufficient to trigger coverage. Moreover, similar to BII, event insurance policies have continually sought to add provisions that negate the insurer's liability for diseases. Consequently, unless it can be shown that the coronavirus directly prevented the insured's ability to perform, this coverage will likely not be triggered.

3. Stay Informed About Government Programs that Can Help
The federal government, of course, has already started to roll out initiatives

designed to help. On a macroeconomic level, the Federal Reserve cut the fed fund rate again on Sunday, essentially to zero, cut the rate of emergency lending at the discount window for banks by 125 basis points and increased the term of such loans to 90 days, and began a $700 billion quantitative easing program.

Taxpayers and businesses, it was announced by Treasury Secretary Mnuchin on March 17th, will have until July 15, 2020 to file and pay their 2019 taxes with no penalties or interest charges. Taxpayers can defer payment of up to $1 million in taxes, and corporate filers can defer tax payments of up to $10 million[viii]. These actions are only some of the initiatives that will be implemented. For example, the Small Business Administration ("SBA") will soon begin to offer an additional $50 billion in SBA loans. For more information on how your business can qualify for an SBA loan, we suggest you read Protect Your Business from Coronavirus with a Disaster Assistance Loan.

4. Review Contracts that Would be Difficult to Continue

What if your company has entered into contracts that it would be impossible, or at least very burdensome, to honor in light of the coronavirus? Although you may have some protection as a result of your insurance coverage (see above discussion), you may have the ability to walk away by virtue of the contract itself.

As explained at greater length in Force Majeure Clauses in the Age of Coronavirus, the first step is to determine whether a provision exists in the contract or under applicable law that excuses a failure to perform as a result of events outside of the party's control. This may be covered by an explicit force majeure clause (a Latin term meaning "superior force"), which removes liability for natural and unavoidable catastrophes that interrupt the expected course of events and restrict participants from fulfilling obligations. While standard force majeure clauses typically do not (at least those written pre-coronavirus) include language regarding infectious disease or global pandemics, as the coronavirus becomes more pervasive and impactful, we can expect to see more litigation about whether a boilerplate force majeure clause provides protection.

If force majeure isn't your ticket, the express or implied doctrines of frustration of purpose and impossibility of performance may also alleviate your contractual liability.

As to frustration, the UCC's impracticability doctrine is codified in UCC § 2-615(a) and provides that "[d]elay in delivery or non-delivery … is not a breach under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid."

While an increase in price is generally insufficient to trigger this doctrine, impracticability may be found where a company was unable to perform on its contract due to a government mandated order.

While proving impossibility will likely be improbable under these circumstances, it is still worth considering. Generally, the party relying on the impossibility doctrine must establish that the subject matter of the contract, or the means of performing the contract, have been "destroyed," making performance "objectively impossible." Moreover, performance is only excused if the parties did not contemplate the intervening event when they entered the contract, and again, performance is not excused if the event merely reduces profits. Whether the coronavirus will be found to rise to this level remains to be seen.

Other provisions to review include any breach, termination, cancellation or repudiation terms that may be applicable under the circumstances. Some agreements also include provisions triggered by events occurring that could reasonably be expected to result in a material adverse change ("MAC") or material adverse effect ("MAE") on the business or its prospects. The occurrence of a MAC or MAE may give one party, such as the potential purchaser of a business, a right to avoid performance under or terminate the agreement.

5. Don't Stick Your Head in the Sand

Now more than ever it is crucial for businesses to be proactive in crisis management. A vague statement, we acknowledge. Let us elaborate:

- As stated above, you need to evaluate where you can cut costs and make those cuts as quickly as possible.
- Business interruption or contingency plans must be put in place in case

production or other operations are further disrupted.

- Engaging in risk mapping and analysis exercises of your supply chain and overall corporate structure will work to ensure that you are aware of the potential and actual risks you are facing. All the while, keep in mind that as you plan to acclimate to this new climate, any processes put in place will likely be hamstrung by restrictions on travel, the closure of facilities, and lack of personnel as we all work to flatten the proverbial curve.

- Maintain open communication with all employees, especially those who will be temporarily out of work, to keep them updated about their work status and forms of financial assistance. With respect to employees, remember that traditional employment law still applies.

- Many employees who are being sent home may be unaware of the fact that they may be eligible for a work furlough, thus alleviating the need for them to use their vacation days (if they even have them). To do so, advise your employees to apply for a work furlough as soon as possible. This will generate the best chance for them to expedite their economic assistance as a mandatory one-week waiting period applies to most filings (although many states have not waived the one-week timetable).

- Keep your customers and suppliers informed as to the status of your company's performance abilities to minimize strain on its relationships. Remember, communication is the key to any relationship. While the prospect of consulting your creditors, in particular, may seem daunting, remember that government help is coming, and everyone is in this together. Remember, it was not that long ago, after 9/11, that America displayed its collective resilience in an unprecedented era of cooperation that will now be necessary yet again.

- Re-read the sections that are numbered above. And consult with a knowledgeable attorney. This crisis is a siren song for the expression,"An ounce of prevention is worth a pound of cure." Timely and decisive action will make all the difference, and demand for competent help in making necessary decisions is likely to dwarf supply.

We've Been Here Before

Whether it is a blessing or a curse, the U.S. and the world are no strangers to crisis management and coping with global economic meltdowns. While the current financial crisis has shown signs of dwarfing the Great Recession of 2008, the important thing to keep in mind is that we have been here before and recovered- in large measure with massive government help, which is clearly already on its way.

In fact, from 2009 through 2019, the U.S. economy had rebounded from the Great Recession to reach unprecedented levels. By the turn of the last decade, the stock market was hitting one record high after the other. The unemployment rate had fallen below 4% for the first time in 50 years as job growth averaged 178,000 jobs per month, and consumer confidence had risen nearly 50%. This is all to say that, at least on a macro level, the effects of the Great Recession have now become a thing of the past.

This will also be true of the current coronavirus crash. American self-reliance and entrepreneurship have never met a challenge it cannot overcome. Ingenuity in the face of new hardships is the cradle of great invention[ix]. On top of that, the rallying of governments, businesses, and individuals alike to respond in a collective manner that promotes the general welfare and greater good provides strength and reassurance that this moment is fleeting, and relief is coming. As such, this is an opportunity to forge a new way forward as it will be those who adapt to the present circumstances, proceed responsibly, contribute to the local, national and international cause, and protect themselves from future threats who will prosper in the end.

About Jonathan Friedland

Jonathan Friedland is an attorney and entrepreneur. He founded DailyDAC in 2010 and launched Financial Poise in 2013. For more information on his legal practice, click here.

About Kyle Fleck

Kyle Fleck is a law clerk with Sugar Felsenthal Grais & Helsinger LLP, a national business-focused law firm boutique with offices in Chicago and New York.

You Will Survive! How Your Business Will Survive Coronavirus – a Crisis Management Plan originally published by Financial Poise, reprinted here with permission.

Footnotes:

[i] - In the last month, crude oil prices have fallen by nearly 40% nearing $30 a barrel and crude oil futures are down 48% on the year as coronavirus and the OPEC-Russia feud continue to wreak havoc. Now, the International Energy Agency and the U.S. Energy Information Administration are both forecasting that the world will use less oil in 2020 than it did in 2019.

[ii] - Airlines are at risk of logging their biggest decline on record as global air traffic counts for 2020 and recent projections for air travel losses stood at $113 billion; the hotel industry stands to lose $10 billion. We believe these numbers are understated. Container companies have lost $1.5 billion in business since January as Chinese exports to the U.S. fell by 28% in the first two months of the year.

[iii] - The current meltdown is a poster child for why diversification within an asset class is not enough (e.g. owning a diversified portfolio of stocks or mutual funds is nice, but not enough. A responsible investor must also diversify *among asset classes*.

[iv] - For more information you may want to read 'Know Thy Numbers' Installment #1 – Welcome to the Jungle, an Introduction to the Series.

[v] - See 'Know Thy Numbers' Installment #3: Types of Financial Statements (explaining how the statement of cash flows shows the changes in operating, investing and financing activities).

[vi] - See page 217 of Corporate Turnaround Artistry.

[vii] - In *Motorists Mut. Ins. Co. v. Hardinger*, 131 Fed. Appx. 823 (3d Cir. 2005), the court reviewed whether a family that became infected with e-coli after moving into their new home was covered under their home insurance policy. Ultimately, the court held that there was a genuine issue of fact as to whether the functionality of the property was nearly eliminated or destroyed, or whether the property was made useless or uninhabitable due to the e-coli, thus constituting a physical loss.

Conversely, in *Source Food Technology v. U.S. Fidelity and Guaranty Corp*., 465 F.3d 834 (8th Cir. 2006), a company that sold cooking oil and shortening made from beef tallow sought indemnity for business interruption coverage after the USDA prohibited the importation of beef products from Canada after cows tested positive for mad cow disease. The court concluded there was no coverage under the policy because the embargoed beef product the insured sought to import was not contaminated or damaged in any way. Nevertheless, *Source Food* indicates that, depending on the language of the specific policy and the circumstances of the loss, contamination of property may constitute physical damage to property if there is enough proof of contamination.

Finally, since the SARS epidemic in the early 2000s that caused insurance companies to payout massive amounts in coverage, the trend in the insurance industry has been to issue policies that expressly negate coverage for communicable diseases. Still, companies should review their policies to evaluate whether a communicable disease exclusion is included and, if so, determine whether that exclusion bars certain events or all bacteria and viruses.

Moreover, companies should evaluate whether they purchased a communicable disease endorsement and if that endorsement will provide coverage as insurance companies will likely argue that losses from the coronavirus are based on “threat and fear” and not “physical loss or damage.”

[viii] - However, based on the language of the announcement, if you fail to file for an extension on April 15th for an individual return, and you pay the tax on July 15 without filing the return on July 15 (expecting to file on the usual extended date of Oct 15th), you will incur a late filing penalty. Thus, to file a 1040 as late as Oct 15th , you still need to file for an extension before April 15!!

[ix] - Maybe some entrepreneur will design and market a better, low-cost face mask that allows people to stop the social distancing and embark from their homes sooner than we now think will be possible. Then again, maybe some of the millions of people who now find themselves telecommuting for the first time won’t want to stop. What might that do to the price of office space? And for that matter, will Hollywood be able to put the genie back in the bottle when the crisis is over, now that Universal Pictures is the first major movie studio to make some of its current movies available on-demand?