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Buying and Selling the Assets of a Bankrupt Company

By Britta Warren and Tim Crippen, Black Helterline LLP

Large-company Chapter 11 bankruptcies appear to be on the rise based on side effects of COVID-19, but individual and small-company bankruptcies appear to lag 2019 rates according to one recent analysis.[1].It is reasonable to speculate, however, that as state-level restrictions on foreclosures and evictions are lifted, smaller businesses will be driven into bankruptcy with greater frequency as well.[2]

Regardless of whether bankruptcy filings increase, however, the bankruptcy process creates opportunities for strategic and financial buyers to buy distressed businesses. In some circumstances, a debtor-in-possession can sell substantially all of its assets to a third party in a so-called "363 sale," which is named for 11 U.S.C. § 363, the Bankruptcy Code section that authorizes and provides the rules for such sales. In other instances, the debtor-in-possession can provide for the sale of assets free and clear of interests as part of the plan confirmation process.

As use of 363 sales becomes more prevalent, business lawyers should be aware of the requirements of Section 363 of the Bankruptcy Code and common practices so they can advise their clients who might be sellers in the bankruptcy process or interested buyers of such assets.

In this Issue

Statutory Framework for 363 Sales

Section 363(b) provides that a debtor-in-possession may use, sell, or lease property of the bankrupt estate outside the ordinary course of the debtor's business with bankruptcy court approval. In addition, under Section 363(f), the sale may be "free and clear of any interest in such property of an entity other than the estate," provided it satisfies any one of certain specified conditions. These include, among other things:

- if applicable nonbankruptcy law permits a sale free and clear
- if the sale price exceeds the amount of all liens encumbering the property
- if the interest is in bona fide dispute

A 363 sale can be beneficial to the debtor in bankruptcy and its creditors because the process is designed to create a bidding war for desirable assets. Likewise, a 363 sale can benefit a strategic or financial buyer, because the debtor in bankruptcy has limited negotiating power independent of the power to market its assets to various bidders. The most significant benefit to a successful 363 buyer, however, is that the buyer acquires the assets of the bankruptcy estate free and clear of all "interests."

The term "interest" is not defined in the Bankruptcy Code. Nonetheless, bankruptcy courts tend to agree that the term extends to liens, encumbrances, and "claims," which under §101(5)(A) of the Bankruptcy Code is defined in the broadest possible fashion to mean any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."

Courts have further interpreted the term "interest" in Section 363(f) to apply to a wide range of situations where the disputed obligation flows from ownership of the property.

Continued on page 2

Buying and Selling Assets

Continued from page 1

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For instance, in *UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*, 99 F.3d 573 (4th Cir. 1996), cert. denied, 520 U.S. 1118, 117 S. Ct. 1251, 137 L. Ed. 2d 332 (1997), the court held that debtors who were coal operators could sell their assets under Section 363(f) free of successor liability that would otherwise arise under the Coal Industry Retiree Health Benefit Act of 1992 (the Coal Act). Although it refused to definitively define the term "interest," the court in *In re Leckie Smokeless Coal Co*. made note that the term is intended to refer to obligations that are connected to, or arise from, the property being sold, stating "[i]t is difficult to make further categorical observations concerning the intended meaning of the words 'interest in'—indeed, the precise boundaries of the phrase likely will be defined only as the courts continue to apply it to the facts presented in the cases brought before them."

The court in *In re TWA,* 322 F.3d 283 (3d Cir. 2003) reached a similar conclusion in allowing a sale of an airline's assets free and clear of travel vouchers that were issued in the context of settlement of employment discrimination claims. The court in *In re TWA* concluded that the travel vouchers were connected to the airline property in the same way as liability under the Coal Act, because the liability arose solely due to the precise nature of the use to which the debtor and its purchaser put the property. See also *In Precision Industries, Inc. v. Qualitech Steel SBQ*, 327 F.3d 537 (7th Cir. 2003) and *Pinnacle Restaurant at Big Sky, LLC v. CH SP Acquisitions, LLC (In re Spanish Peaks Holding II, LLC)*, 872 F.3d 892 (9th Cir. 2017), holding that a real-property lease can be extinguished in a free-and-clear sale of the property under Section 363(f).

There are, however, limitations to the applicability of 363 sales. Most notably, the court in *Olson v. Frederico (In re Grumman Olson Indus., Inc.)*, 445 B.R. 243 (Bankr. S.D.N.Y. 2011) ruled that a Section 363 sale order cannot exonerate purchasers from successor liability claims by claimants who, at the time of the sale, had not yet been injured and had no contact or relationship with the debtor or its products. See also *Folger Adam Security, Inc. v. DeMatteis/MacGregor*, JV, 209 F.3d 252 (3d Cir. 2000), where the court refused to include defenses or the right of recoupment within the definition of "interests" in Section 363(f). In addition, Section 363(e) requires a court, on request of a party in interest, to condition a sale so as to provide adequate protection to an interest in property that is sold under Section 363, which can include the "interest" attaching to the sale proceeds, thereby reducing the amount available to pay to general unsecured creditors.

Mechanics of a 363 Sale – Marketing, Motion Practice, and Related Rules

The outline of a 363 sale outside of the plan confirmation process includes:

(i) the debtor marketing the assets and identifying a stalking-horse bidder,

(ii) the stalking-horse bidder and debtor entering into an asset purchase agreement, including break-up fee and overbid protections,

(iii) the debtor seeking court approval of the asset purchase agreement and auction provisions, which also triggers creditors' opportunity to object, and

(iv) the court-supervised or approved auction, entry of an order authorizing the 363 sale, and closing of the asset sale transaction.

Generally, the time from initial negotiations through the 363 sale ranges from 75 to 150 days, depending on the duration of marketing, and the extent of negotiations among the debtor, stalking horse bidder, and creditors. A debtor can seek to shorten this general timeline when it is able to demonstrate sufficient cause, which can include a showing that the assets to be sold as part of the 363 sale are subject to deterioration.

Typically, a 363 sale begins when the debtor-in-possession markets the business assets to third parties who might be interested in acquiring the assets. The debtor-in-possession might be motivated to initiate a bidding war for a 363 sale to protect any individual or business guarantors by satisfying secured creditors to the greatest extent possible and thereby eliminating or mitigating the guarantors' exposure. In a Chapter 11 proceeding, the debtor-in-possession can control the sale until a trustee is appointed by action of one of the creditors based on a finding of cause, or the case is converted to Chapter 7. See 11 U.S.C. §§ 1104(a), 1112(b).

One initial bidder—either the first to the table or the bidder making the best offer among all bidders—often works with the debtor-in-possession to identify as the stalking-horse bidder.

Continued on page 3

Buying and Selling Assets

Continued from page 2

The stalking-horse bidder's offer sets the baseline that other bidders must exceed to prevail at an eventual auction. The stalking-horse bidder and the debtor-in-possession enter into an asset purchase agreement that establishes the terms for the sale. A stalking-horse bidder (or any buyer) should not expect to receive the seller warranties and buyer indemnification protections available to a strong buyer in a typical merger and acquisition transaction, but the sale need not be on an "as is, where is" basis either.

The asset purchase agreement also establishes special benefits for the stalking-horse bidder, as compensation for the time and expense of conducting due diligence and providing the initial offer that sets off the bidding. Such benefits can include a break-up fee and minimum overbid requirement. A break-up fee is a fee that the stalking-horse bidder gets, if out-bid at the auction, to compensate it for having spent its own time, attorneys' fees, and other professional fees to make the offer, conduct due diligence, interact with creditors to attempt to head off any anticipated objections, and negotiate the asset purchase agreement. The minimum overbid requirement is the minimum amount by which another bid must exceed the stalking-horse bidder's offer, which creates an efficient auction and protects the stalking-horse bidder from being minimally overbid.

The debtor-in-possession and the stalking-horse bidder sign the asset purchase agreement, which is only binding if it obtains court approval and if the stalking-horse bidder prevails at the court-approved auction. But this form of asset purchase agreement becomes the form of agreement that will be signed by whichever bidder prevails at the auction, subject to limited court-approved changes.

The asset purchase agreement is typically filed with the court along with a motion for court approval of bidding procedures and scheduling of an auction date. Creditors have the opportunity to object to the process, and the debtor-in-possession must demonstrate that the proposed sale is a result of sound business judgment and is in the best interest of the estate. Break-up fees, who can be a qualified bidder, and overbid requirements are frequent areas of negotiation and argument. Typically, the break-up fee must be reasonable and have some relation to the actual costs incurred by the stalking-horse bidder.

Along with obtaining court approval of the bidding procedures, the debtor-in-possession will also file a motion seeking court approval of the 363 sale and authorizing the transfer of assets free and clear of all liens, encumbrances, claims, and interests. The auction is then conducted in accordance with rules approved by the bankruptcy court. Bidders at the auction can expect that significant secured creditors will credit-bid their claims. Strategically, bidders should have considered and pre-empted potential credit bids in order not to be surprised at the auction. At the conclusion of the auction, the bankruptcy court will conduct a hearing and then enter an order authorizing the sale of assets under Section 363. This sale order is typically heavily negotiated among the debtors, the purchaser, secured creditors, any official committee(s), and any other significant party-in-interest, both prior to and after the auction results are determined and before the hearing on the motion to authorize the 363 sale.

A motion for authority to sell free and clear of liens or other interests is governed by Federal Rule of Bankruptcy Procedure 6004(c), which provides that the motion shall be made in accordance with Rule 9014. Rule 9014 requires that service of a motion initiating a contested matter be in the same manner as provided under Rule 7004 for service of a summons and complaint. Additionally, Local Rule of Bankruptcy Procedure for the District of Oregon 6004-1(c) requires that a motion in a chapter 11 case for the sale of all or substantially all assets and any related sale procedures motion comply with the guidelines set forth in Local Bankruptcy Form 363, which includes, without limitation, guidelines for contents of sale motions, provisions governing bid protections to stalking-horse bidders, and provisions governing the auction process and notification requirements.

Limitations on Appeal

A completed, court-approved 363 sale is susceptible to challenge or revocation only under very limited circumstances. Section 363(m) provides, "[t]he reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of the sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal." The practical implication of this provision is that (1) if a bankruptcy court concludes that the buyer acted in good faith and (2) there is no stay of the sale prior to closing, then a reversal or modification of an order entered under Section 363 authorizing the sale does not unwind the transaction. Once a good-faith purchaser closes the asset purchase sale, absent a stay of the closing, the sale will stand. ◆

Endnotes

1. Harvard Business School: "Bankruptcy and the COVID-19 Crisis" https://www.hbs.edu/faculty/Publication%20Files/21-041_a9e75f26-6e50-4eb7-84d8-89da3614a6f9.pdf
2. See HB 4204 (2020); Executive Order 20-37 (foreclosure moratorium), and HB 4213 (2020); Executive Orders 20-13 and 20-56 (eviction moratorium).

Relief from Eviction During COVID-19 Crisis

By Pete Meyers, Meyers Law LLC

Pete Meyers is a Portland attorney who specializes in landlord-tenant law.

Because of the economic and public-health effects of the coronavirus, landlord-tenant laws changed significantly in 2020. The lion's share of these changes affected the ability of residential and commercial landlords to terminate tenancies for nonpayment of rent. Two laws also limited no-cause residential termination. The key concepts are that tenants cannot be terminated for nonpayment of rent during any relevant "emergency period," and they have a "grace period" to pay back that accrued rent.

The Applicable Laws

- House Bill 4213 (HB 4213) applies statewide to both residential and commercial tenancies.
- Executive Order 20-56 (EO 20-56): applies statewide to residential tenancies only.
- Multnomah County Ordinance No. 1287 applies countywide to residential tenancies only.
- Federal Centers for Disease Control (CDC) Order, 85 FR 55292
- Portland Ordinance No. 190122

Commercial Tenancies

Commercial tenancies need comply with HB 4213, but are not affected by EO 20-56 or Multnomah County Ordinance No. 1287. Under HB 4213, with its emergency period now over, commercial landlords may terminate for a tenant's nonpayment of rent or other charges from October forward. A grace period applies to rent and other charges that accrued from April 1 to September 30. That grace period ends March 31, 2021, and tenants have until then to pay accrued rent and other charges or they may be terminated beginning on April 1, 2021.

A grace-period notice from the landlord should include all of the following:

a) the date that the emergency period ended (September 30);
b) a statement that if rents and other payments that now come due are not paid on time, the landlord may terminate the tenancy;
c) a statement that the nonpayment balance that accrued during the emergency period is still due and must be paid;
d) a statement that the tenants will not owe a late charge for the nonpayment balance;
e) a statement that the tenants are entitled to a six-month grace period to repay the nonpayment balance and that that period ends on March 31, 2021;
f) a statement that within a specified date that is at least 14 days after "delivery" (undefined in Chapter 90 and HB 4213) of the notice, tenants must either pay the nonpayment balance or notify the landlord that tenants intend to pay that balance at the end of the six-month grace period;
g) a statement that if the tenants fail to give landlord notice that they intend to use the grace period, the tenants will owe a penalty to the landlord of fifty percent of one month's rent; and
h) a statement that rents and other charges or fees that now come due must be paid as usual or the landlord may terminate the tenancy.

Tenants must respond with their own notice within the 14-day period mentioned at (f) above. Commercial tenants must give notice under ORS 91.110 (personal service, posted conspicuously, or left at landlord's residence).

If a landlord does not abide by HB 4213, tenants may obtain injunctive relief to recover possession of the property and may recover up to three times one month's rent, as well as actual damages.

Residential Tenancies

Statewide, outside Multnomah County, EO 20-56 applies. EO 20-56 is similar to HB 4213, except for extending the emergency period through December 31. Landlords cannot give a termination notice for nonpayment of April through December rent.

EO 20-56 does not mention a grace period, so we are still using the HB 4213 grace period of October 1, 2020, through March 31, 2021. Thus, tenants are exposed to eviction beginning on January 1, not only for nonpayment of January rent, but also for nonpayment of October through December rent.

The usual order of payments under ORS 90.220 changes. Now, the first dollar received goes to rent for the current rental period. Applying rent to previous rental periods drops out entirely. Landlords can still give a grace period notice, but the notice must state that eviction is not allowed before December 31.

Residential tenancies are likewise subject to HB 4213, but EO 20-56 has an "eviction moratorium period" that runs from September 30

Continued on page 5

Eviction *Continued from page 4*

through December 31, 2020. Yet EO 20-56 does not have its own grace period, so let us assume the grace period of HB 4213 still applies. That means that the HB 4213 grace period (October 1 to March 31, 2021) and the dates to which that grace period applies (April 1 to September 30) still hold force. Thus, on January 1 a landlord could terminate for nonpayment of October through December's rent because those rents are not included in the grace period.

If landlords give tenants a grace period notice under HB 4213, or any other notice that the tenants continue to owe rent, that notice must state that the tenants cannot be evicted for nonpayment before December 31, 2020.

Under EO 20-56, only two landlord-side no-cause terminations are permitted:

- The landlord or an immediate family member intends to occupy the dwelling unit as its primary residence. See ORS 90.427(5) (c).
- The landlord has accepted an offer to purchase from a person who intends in good faith to occupy the dwelling unit as the person's primary residence. Further, the landlord must produce written evidence of the offer. See ORS 90.427(5)(d).

EO 20-56 also extends the first-year-of-occupancy rule of ORS 90.427. If the first year of occupancy would have ended between April 1 and December 31, 2020, it does not end until January 31, 2021.

EO 20-56 does not have the same remedy scheme as HB 4213, but one more stringent. If landlords violate the rule, they are guilty of a Class C misdemeanor.

Inside Multnomah County, EO 20-56 and No. 1287 apply. A landlord cannot terminate for nonpayment of rent until January 9, 2021, provided that tenants pay October through January 8 rent. A grace period runs from January 9 through July 7, which affects language on the grace-period notice. The landlord cannot send that notice until January 9. No-cause terminations are allowed only if the landlord has sold the dwelling unit.

Multnomah County tweaked HB 4213 further. Its Ordinance No. 1287, adopted by the commission on September 24, created its own emergency period of October 1, 2020, to January 8, 2021. It also created its own grace period of January 9, 2021 to July 7, 2021. This means that tenants have until July 7 to repay any rent that has accrued from April 1 to September 30, 2020, provided that tenants pay current rent during the grace period. See Ordinance No. 1287, § 3 B.3. However, read together with EO 20-56, which is more liberal, the only basis for termination for nonpayment of rent is for January alone (and not for nonpayment of October through December, as allowed under HB 4213 alone).

If landlords give tenants a grace-period notice, that notice cannot be given earlier than January 8, 2021, and the notice should reflect the July 7 grace period (in addition to the EO 20-56 requirements). Drafting the notices under these new laws is challenging.

In regard to no-cause terminations in Multnomah County, the only exception is if the landlord's qualifying reason was that it had accepted an offer to purchase the tenant's dwelling unit. Ordinance No. 1287 did not incorporate EO 20-56's exception if a landlord or an immediate family member intends to occupy the dwelling unit.

Tenants' remedies under Ordinance No. 1287 are the same as under HB 4213.

Federal Order

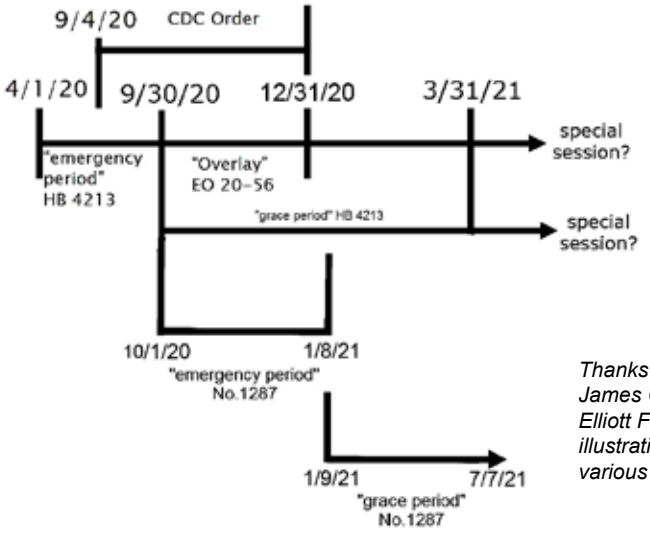
Meanwhile, the federal CDC Order 85 FR 55292, is in effect until December 31, 2020. That order prohibits terminations for nonpayment of rent and, arguably, all no-cause terminations. If tenants submit to landlords a "covered person" declaration, the tenants qualify for protection. Because EO 20-56 and No. 1287 already prevent landlords from terminating for nonpayment through the end of the year, landlords need be concerned only if they contemplate a no-cause notice. Landlord penalties under the CDC order are stiff, starting with a $100,000 fine and one year in jail.

Portland's Status

The City of Portland has addressed rent increases and affordable housing evictions under Portland Ordinance No. 190122, as amended. Any rent increase triggers the relocation assistance requirements of PCC 30.01.085, unless the landlord gave the notice before September 16, 2020, rescinds the notice, and refunds any increased rent within 30 days, or the landlord gave the notice after September 16, represents in good faith that the landlord did not know about the ordinance, and then rescinds the notice within 30 days. This ordinance is in effect until March 31, 2021.

What is Ahead

Finally, there is the possibility of the legislature extending the emergency period through the end of 2021 and allowing an 18-month grace period. We do not know if that will happen, but the odds are very good that there will be more legislation that affects landlord-tenant relationships in Oregon. ◆



Thanks to James Gardner and Elliott Farren for this illustration of the various timelines.

New COVID-19 Workplace Safety Requirements for Oregon Employers

By Elizabeth A. Semler, Sussman Shank LLP

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On November 6, 2020, the Oregon Occupations Safety and Health Division (OR-OSHA) released a Temporary Rule Addressing COVID-19 Workplace Risks (OAR 437-001-0744). The rule took effect on November 16, 2020, and remains in effect until May 4, 2021, unless earlier revised or repealed. The rule creates a number of new obligations for employers including, as discussed in more detail below:

- allowing employees to wear masks even when not required
- performing a COVID-19 risk assessment
- adopting an infection control plan
- providing employee training
- creating a mechanism to notify employees of close contact with an infected individual within 24 hours
- reinstating employees following isolation/quarantine

The rule applies to all employees who work in places of employment subject to OR-OSHA's jurisdiction, incorporates guidance from the Oregon Health Authority (OHA), and includes provisions generally applicable to all workplaces and specific rules for exceptional-risk workplaces as well as guidance for specific industries and types of businesses.[1] This article will discuss the rule as generally applicable to employers.

Mask, face covering, or face shield requirements

Employers must now allow an employee to wear a mask, face shield, or face covering even when it is not required. Guidance on mask requirements is here: https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/le2288K.pdf

Posting

Employers must post the "COVID-19 Hazards" poster in a conspicuous place and must provide a copy of the poster to remote employees electronically. The poster is here: https://osha.oregon.gov/OSHAPubs/5504.pdf

Infection Notification Process

Employers must establish a process to notify employees within 24 hours that they have either: had a work-related contact with an individual who has tested positive for COVID-19; or that an individual who was present in the same facility or portion of a facility has confirmed COVID-19. A model policy for notification is here: https://osha.oregon.gov/Documents/Model-COVID-19-Notification-Policy.pdf

Medical removal/job reinstatement

Employers must allow an employee who has been instructed to quarantine or isolate by public-health authorities or a medical provider to work at home if suitable work is available and the employee's condition permits, and must return the affected employee to his or her previous job duties if still available and without any adverse action as a result of participation in COVID-19 quarantine or isolation activities.

Risk Assessment

By December 7, 2020, all employers must conduct a COVID-19 exposure risk assessment and must obtain employee feedback/participation when conducting the risk assessment. Employers with ten or more employees and workplaces at exceptional risk must complete a written assessment. (Link to template). The risk assessment must address multiple questions related to potential employee exposure to COVID-19, including:

- Can employees telework or otherwise work remotely? How are employees encouraged or empowered to use those distance work options to reduce COVID-19 transmission at the workplace?
- What are the anticipated working distances between employees? How might those physical working distances change during non-routine work activities?
- What is the anticipated working distance between employees and other individuals? How might those working distances change during non-routine work activities?
- How have the workplace or employee job duties, or both, been modified to provide at least six feet of physical distancing between all individuals?
- How are employees and other individuals at the workplace notified where and when masks, face coverings, or face shields are required? How is this policy enforced and clearly communicated to employees and other individuals?

Continued on page 7

- How have employees been informed about the workplace policy and procedures related to reporting COVID-19 symptoms? How might employees who are identified for quarantine or isolation as a result of medical removal under this rule be provided with an opportunity to work at home, if such work is available and they are well enough to do so?
- How have engineering controls such as ventilation and physical barriers been used to minimize employee exposure to COVID-19?
- How have administrative controls (such as foot-traffic control) been used to minimize employee exposure to COVID-19?
- What is the procedure or policy for employees to report workplace hazards related to COVID-19? How are these hazard reporting procedures or policies communicated to employees?
- How are sanitation measures related to COVID-19 implemented in the workplace?
- How have the industry-specific or activity-specific COVID-19 requirements and applicable guidance from the Oregon Health Authority been implemented for workers?
- In settings where the workers of multiple employers work in the same space or share equipment or common areas, how are the physical distancing; mask, face covering, or face shield requirements; and sanitation measures required under this rule communicated to and coordinated between all employers and their affected employees?
- How can the employer implement appropriate controls that provide layered protection from COVID-19 hazards and that minimize, to the degree possible, reliance on individual employee training and behavior for their efficacy?

Infection-Control Plan

By December 7, 2020, all employers must establish and implement an infection-control plan based on their risk assessment that adopts controls, including, but not limited to, ventilation, staggered shifts, redesigning the workplace to accommodate physical distancing, reducing use of shared surfaces and tools, limiting the number of employees and other individuals in work areas, personal protective equipment, etc. Employers with more than ten employees and workplaces at exceptional risk must document their infection control plan in writing and make a copy available to employees.

The infection control plan must include, at a minimum:

- A list of all job assignments or worker tasks requiring the use of personal protective equipment (including respirators) necessary to minimize employee exposure to COVID-19
- The procedures the employer will use to ensure that there is an adequate supply of masks, face coverings, or face shields and personal protective equipment (including respirators) necessary to minimize employee exposure to COVID-19
- A list and description of the specific hazard control measures that the employer installed, implemented, or developed to minimize employee exposure to COVID-19
- A description of the employer's COVID-19 mask, face covering, and face shield requirements at the workplace, and the method of informing individuals entering the workplace where such source control is required
- The procedures the employer will use to communicate with its employees and other employers in multi-employer worksites regarding an employee's exposure to an individual known or suspected to be infected with COVID-19 to whom other workers may have been exposed
- The procedures the employer will use to provide its workers with the initial employee information and training required by this rule

Employee Training

No later than December 21, 2020, employers must provide workers with information and training regarding COVID-19. This information and training can be provided remotely or using computer-based models but must be provided in a manner and language understood by the affected workers. OR-OSHA will provide training materials for use by employers. Training must cover the following topics and allow an opportunity for employee feedback:

- Physical distancing requirements as they apply to the employee's workplace and job function(s)
- Mask, face covering, or face shield requirements as they apply to the employee's workplace and job function(s)
- COVID-19 sanitation requirements as they apply to the employee's workplace and job function(s)
- COVID-19 signs and symptom reporting procedures that apply to the employee's workplace
- COVID-19 infection notification process
- Medical removal of infected individuals
- The characteristics and methods of transmission of COVID-19;
- The symptoms of COVID-19
- The ability of pre-symptomatic and asymptomatic individuals to transmit COVID-19
- Safe and healthy work practices and control measures, including but not limited to, physical distancing, sanitation and disinfection practices

Continued on page 8

Safe and healthy work practices and control measures include face masks, physical distancing, disinfection, and adequate ventilation.

Common Areas

Employers who operate or control buildings where employees of other employers work must ensure sanitation requirements are met and must post signs in areas where masks, face coverings, or face shields are required. This can be done using the Oregon Health Authority "Masks Required" sign: https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/le2728.pdf

Ventilation Requirements

By January 6, 2021, employers must optimize the amount of outside air circulated through its existing heating, ventilation, and air conditioning (HVAC) system(s), to the extent the system can do so when operating as designed, whenever there are employees in the workplace and the outdoor air quality index remains at either "good" or "moderate" levels. Employers must also maintain/replace air filters to ensure proper function of ventilation systems and clean and maintain intake ports that provide outside air.

The rule also restates existing OR-OSHA and OHA rules concerning physical distancing, masks/face coverings/face shields, and cleaning and sanitation. The full text of the temporary rule is here: https://osha.oregon.gov/OSHARules/div1/437-001-0744.pdf

OSHA Reporting and Recording of Work-related COVID-19 Cases

Employers should also be aware that OSHA recently clarified reporting requirements for COVID-19 cases. Under OSHA regulations, "employers are only required to report in-patient hospitalizations to OSHA if the hospitalization 'occurs within twenty-four (24) hours of the work-related incident." For cases of COVID-19, the term "incident" means an exposure to SARS-CoV-2 in the workplace. Therefore, in order to be reportable, an in-patient hospitalization due to COVID-19 must occur within 24 hours of an exposure to SARS-CoV-2 at work. As OSHA explains: "An employer must report such hospitalization within 24 hours of knowing both that the employee has been in-patient hospitalized and that the reason for the hospitalization was a work-related case of COVID-19." https://www.osha.gov/SLTC/covid-19/covid-19-faq.html#reporting

The fact that a workplace exposure is not reportable to OSHA, does not mean that the incident should not be recorded by an employer who is required to keep OSHA injury and illness records. Guidance on recording work-related confirmed cases of COVID-19 can be found here: https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19

Rules are Evolving

COVID-19 related rules and regulations are constantly changing and it is possible that by the date of publication, rules above may have been amended or modified. Employers are advised to monitor the OR-OSHA, OHA, and OSHA websites and subscribe to agency alerts to receive the latest information. ◆

Endnote

1. For example, there are separate appendices with guidance for: (i) Restaurants, Bars, Brewpubs, and Public Tasting Rooms at Breweries, Wineries, and Distilleries; Retail Stores; Outdoor and Indoor Markets; Personal Services Providers; Construction Operations; Indoor and Outdoor Entertainment Facilities; Outdoor Recreation Organizations; Employers operating swimming pools, spa pools, sport courts and fitness-related organizations; Veterinary Care; Schools, Collegiate Sports; First Responders and Law Enforcement.

Oregon OSHA offers resources to help comply with COVID-19 workplace rules

Oregon OSHA encourages employers and workers to use the division's resources to help understand and comply with the requirements. Resources include forms, documents, posters, consultation services, and technical staff.

More information and links to available resources can be found at https://osha.oregon.gov/news/2020/Pages/nr2020-41.aspx

Legislative and Regulatory Responses to Business Bankruptcy Risk Due to COVID-19

By Erich M. Paetsch, Saalfeld Griggs PC

Erich Paetsch is a shareholder and head of the financial services industry group at the business-focused law firm of Saalfeld Griggs PC in Salem. He regularly represents businesses and lenders in state and federal court, including bankruptcy court, as part of his creditors rights and litigation practice.

The economic impact of COVID-19 and public health measures to control the pandemic have had a profound effect on the economy. Financial institutions are projecting significant losses within loan portfolios. The federal and state legislative reaction to the pandemic encourages lenders to explore alternatives to litigation, including deferments, forbearance, and workout agreements. The Small Business Reorganization Act of 2019 (SBRA)[1] that took effect on the eve of the current pandemic is a significant change to Chapter 11 of the Bankruptcy Code and provides additional incentive for lenders to explore bankruptcy alternatives

Every business owner is deeply invested in the success of the business. When an unexpected event such as a global pandemic arises, despite best business practices, owners may need to consider bankruptcy protection to address the economic fallout. For many, the prospect of filing bankruptcy is a last resort, used only when other efforts fail. There are many factors that influence when and whether to file a bankruptcy petition. Factors include the number of secured creditors and amounts owed, the amount of available cash for operations, whether a viable plan of reorganization exists, and the effect a petition might have on business reputation, customer perceptions, and access to critical trade vendors. The decision to file is frequently driven by the actions of third parties, such as secured creditors who make a demand or a vendor that refuses to provide additional product and asserts a lien. When these events occur, small businesses may be forced to accept foreclosure or creditor-controlled liquidation instead of filing a bankruptcy petition because of the cost and time traditionally required in a business bankruptcy.

The Small Business Reorganization Act of 2019 (SBRA)

SBRA was a congressional response to concerns that many small-business debtors avoid filing bankruptcy. When they do file, they face difficulty successfully reorganizing under Chapter 11 of the Bankruptcy Code. The costs and time required mean many businesses are deterred from considering Chapter 11 a viable response to creditor collection activities.

SBRA now provides a new mechanism for small businesses to reorganize under the Bankruptcy Code: subchapter v of Chapter 11.

To qualify for bankruptcy relief under SBRA, a small business must satisfy the eligibility definition and debt limits imposed by Congress. Any debtor engaged in commercial or business activities is eligible, except those whose primary activity is the owning of single-asset real estate. SBRA permits a debtor with no more than $2,725,625 in secured and unsecured debt to seek relief. However, in anticipation of the need for bankruptcy reorganization due to the economic impact of COVID-19, Congress temporarily increased the so-called debt cap to $7,500,000 as part of the Coronavirus, Aid, Relief, and Economic Security Act (CARES Act)[2] through March 27, 2021. As a result, many more businesses in Oregon affected by the pandemic are now eligible for and may elect SBRA treatment under the Bankruptcy Code.

SBRA retains many of the governance and oversight features traditionally included in a business bankruptcy. As with other forms of Chapter 11, the small business debtor typically remains a debtor-in-possession (DIP) under SBRA. This means the DIP continues to run the business during the bankruptcy and controls the property of the business. However, a unique feature of SBRA is that only the DIP has the power to file a plan of reorganization. This change effectively tilts the governance power in favor of the debtor and away from creditors. Without such powers, SBRA limits the impact lenders can have in objecting to a DIP's preferred form and process for reorganization.

Perhaps the single biggest change under SBRA is that a trustee will be appointed regardless of DIP status. This is a substantial change from prior small-business cases that lacked oversight or meaningful creditor engagement. The duties of a trustee under SBRA will sound familiar. They include conducting a meeting of creditors, collecting and distributing payments, and general administrative oversight of the case.

Continued on page 10

Bankruptcy

Continued from page 9

SBRA imposes strict time limits for action upon the filing of an eligible bankruptcy petition.

However, SBRA also creates important additional trustee duties that include requiring appearances at all status conferences and facilitation of the development of a consensual plan of reorganization. Because SBRA is new, there is minimal guidance on what trustee facilitation looks like and what standards a court might impose upon the trustee and parties to ensure facilitation occurs.

SBRA also imposes strict time limits for action upon the filing of an eligible bankruptcy petition. The court is required to hold a status conference within 60 days of the petition date to further the prompt resolution of the case, and the DIP must file a report within that timeframe that details its efforts to obtain an agreed-upon plan of reorganization. The DIP also must file its reorganization plan within 90 days of the petition date, and the plan cannot exceed five years. Each deadline is significantly shorter than prior requirements of Chapter 11 under the Bankruptcy Code.

Finally, SBRA also makes two other major changes to traditional Chapter 11 bankruptcy practices. Traditionally, proposed plans in Chapter 11 of the Bankruptcy Code must satisfy the absolute priority rule. The absolute priority rule can be summarized as requiring that treatment of creditor classes created in a proposed bankruptcy plan must be "fair and equitable." In addition, a typical Chapter 11 process permits affected classes of creditors to vote on approval or rejection of a proposed plan and treatment. SBRA completely eliminates the voting process and application of the absolute priority rule. Instead SBRA imposes a more general fair and equitable standard that is not further defined in SBRA.

SBRA challenges working assumptions about the likelihood and outcomes of a business bankruptcy filing. By specifically attempting to limit the cost and time frame involved in filing a bankruptcy petition under Chapter 11, SBRA opens the door to more small businesses realistically considering bankruptcy as an alternative. SBRA increases the likelihood that eligible businesses might successfully reorganize after the impacts of the pandemic recede, providing an opportunity to discharge certain debts created by the pandemic or to repay other debts over time. The significant eligibility expansion of SBRA by the CARES Act also requires financial institutions to consider the possibility that relief under SBRA is more likely than through the traditional Chapter 11 bankruptcy process. SBRA also creates uncertainty about the potential outcome if a bankruptcy filing occurs. In addition to expanding eligibility under SBRA, the CARES Act, and state-law responses to the pandemic also provide incentives to financial institutions to consider alternatives to bankruptcy.

The CARES Act

The Coronavirus Aid, Relief, and Economic Security (CARES) Act, implemented by Congress in response to the economic effects of COVID-19, remains an important driver of financial-institution response to the pandemic. Among its many provisions:

- it creates a forbearance program for federal-backed mortgage loans
- it protects borrowers from negative credit reporting due to loan accommodations
- it provides financial institutions the option to temporarily suspend certain requirements under generally accepted accounting principles related to troubled debt restructurings

Following the lead of the CARES Act, regulatory agencies are encouraging financial institutions to work with borrowers unable to satisfy obligations due to COVID-19[3]. These changes provide financial institutions broad discretion to adopt modification programs to implement these changes.

In rapid response to the CARES Act, many financial institutions implemented modification programs to respond to borrower defaults caused by the COVID-19 pandemic. For example, lenders agreed to defer payments for a limited period if a business demonstrated adverse impact due to COVID-19. In addition to payment defaults, financial covenants and other nonpayment defaults were commonplace as the economic effect of the pandemic drastically altered business models. In such cases, lenders commonly agreed to forbear from enforcing such defaults by agreement with borrowers, providing valuable breathing room to pivot to address the uncertain and disparate impacts of COVID-19. Combined with the Paycheck Protection Program loan and other programs, the effect of these measures was to delay the immediate impact of COVID-19 and related public-health measures.

Continued on page 11

 Continued from page 10

Effect of State Law on Financial Institutions

The State of Oregon separately adopted measures also intended to incentivize financial institutions to accommodate or delay response to the effects of COVID-19. Among many executive orders and limited special-session legislation, the "foreclosure moratorium" has had the greatest impact. Upon passage on June 30, 2020, HB 4204 included many provisions that restrict lenders, in addition to barring and restraining foreclosure activity upon loans secured by real property in Oregon.

For example, HB 4204 attempts to prevent lenders from declaring a payment default if relief is requested due to COVID-19, alters the ability to charge default interest, eliminates the ability to charge certain fees and charges, and affects the ability of lenders to obtain and charge for inspections and appraisals. HB 4204 was initially limited in duration, set to expire on September 30, 2020. However, the provisions of HB 4204 were extended by Governor Brown in an executive order until December 31, 2020. While the validity and scope of HB 4204 remains contentious and under legal challenge, the substantive impact provides additional incentives to financial institutions to consider alternatives to traditional litigation and foreclosure activity.

Weighing the Pros and Cons

There are potential advantages to a business implementing forbearance or deferment agreements with lenders rather than filing for bankruptcy. The CARES Act and state legislation encourage or impose deferment or forbearance conditions on some lenders. The framework created by this legislation provides a template for additional negotiated agreements, which facilitates faster resolution, greater flexibility, and less cost and disruption to a business trying to recover from the pandemic. However, such mutually agreeable arrangements typically require concessions on the part of the business—such as additional collateral, the consent and participation of all key players, and having to forgo some bankruptcy-code benefits, including the automatic stay and other protections.

To Summarize

COVID-19 and the public health measures adopted to stop its spread and save lives have dramatically altered typical financial-institution responses to business-loan defaults. The CARES Act provisions and regulatory guidance provide incentives to lenders to work with businesses affected by COVID-19. In lieu of traditional litigation or foreclosure activity, the CARES Act provides incentives and important accounting changes that encourage lenders to provide payment deferments, forbearance, and workout agreements. Both the federal and state efforts to respond to COVID-19 are limited in duration. When existing restrictions expire or are terminated, financial institutions will again be permitted to take action to enforce loan defaults. When that occurs, many businesses may consider using SBRA to start fresh in a post-pandemic world if additional deferment, forbearance, or a workout do not benefit them or are unavailable. Financial institutions may consider longer forbearance and workout agreements, and choose to control outcomes and obtain some of the benefits of a negotiated resolution. ◆

Endnotes

1. Pub. L. No. 116-54 (2019)
2. Pub L. No. 116-136 (2020)
3. Interagency Statements on Loan Modifications and Reporting for Financial Institutions Working with Customers Affected by the Coronavirus (Revised), April 7, 2020. https://www.fdic.gov/news/financial-institution-letters/2020/fil20022.pdf

Oregon State Bar Board of Governors Special Election

As of January 1, 2021, there will be one vacant seat in Region 5 (Multnomah County). Candidate statements are due by 5:00 PM on December 16, 2020. Unless candidate challenges are received, the special election will begin January 18, 2021. The successful candidate will assume office immediately following the election. More information.

Business Law Section News

Annual Meeting

The Section held its annual meeting online on November 5, 2020. At the meeting, the following were elected to the Executive Committee.

Officers

Terms ending December 31, 2021
Chair: Jeffrey S. Tarr
Chair-Elect: Kara E. Tatman
Past-Chair: Genevieve A. Kiley
Secretary: William J. Goodling
Treasurer: Anne E. Arathoon

Members-at-Large

Terms ending December 31, 2022
Charmin B. Shiely
Benjamin M. Kearney
James K. Hein
Michael Walker
Term ending December 31, 2021
Tyler J. Volm

Members previously elected to the executive committee and continuing through December 31, 2021, include:
Matthew D. Larson
Brian Jolly
Jennifer Nicholls
Emily M. Maass
David G. Post ◆

New Executive Committee Member

***Michael D. Walker** is a Portland business, tax, and estate planning attorney.*

He has worked with individuals and small-to-medium-sized businesses for nearly 30 years, and is a partner at Samuels Yoelin Kantor LLP.

Fall CLE Program

On November 5 and 6, the Business Law Section sponsored "Current Developments in Business Law."

This two-day CLE webcast covered current topics essential to the practice of business law:

- Regional Corporate Law Update: Oregon, Washington, California
- Rebounding: Employer Tips & Protocols for Returning to Work
- Access to Justice: History of Exclusionary Laws, Social Equity Programs, and How Business Lawyers Can Help
- Representation and Warranty Insurance and Business Interruption Insurance
- What You Should Know About Business Bankruptcy in times of COVID-19
- Special Purchase Acquisition Companies
- Negotiating a Deal Ethically

The members of the planning committee—Genny Kiley, Adam Adkin, Anne Arathoon, Benjamin Kearney, Matt Larson, Charmin Shiely, Kara Tatman, and Tyler Volm—thank these presenters for generously sharing their expertise:
Joe Bailey, Perkins Coie LLP
Anthony Blake, Markowitz Herbold PC
Kyle Busse, Markowitz Herbold PC
George Colindres, Perkins Coie LLP
Timothy Conway, Tonkon Torp LLP
Eric DeJong, Perkins Coie LLP
Gina Eiben, Perkins Coie LLP
Julieanna Elegant, Lewis & Clark Small Business Clinic
Colin Folawn, Schwabe Williamson & Wyatt PC
Seena Ghebleh, Perkins Coie LLP
Seth Row, Miller Nash Graham & Dunn LLP
Valerie Sasaki, Samuels Yoelin Kantor LLP
Ava Schoen, Tonkon Torp LLP
June Wang, Perkins Coie LLP ◆

Oregon State Bar Business Law Section

The mission of the Oregon State Bar Business Law Section is to provide excellent service to the diverse group of business-law practitioners throughout the State of Oregon by providing regular, timely, and useful information about the practice of business law, promoting good business lawyering and professionalism, fostering communication and networking among our members, advocating improvement of business law, and supporting Oregon's business infrastructure and business community.

2020 Law-school Scholarships Awarded

The Business Law Section awarded three $1,000 scholarships to current law students for their outstanding potential to contribute to the Oregon business-law community.

Diego Gutriérrez
Lewis and Clark Law School

Diego Gutiérrez is a third-year law student at Lewis & Clark. Before law school, Diego worked as an income tax preparer serving mostly immigrant communities in need of tax advocacy. During his 1L and 2L summers, he was a Summer Associate for Lane Powell, where he worked on a variety of corporate and business legal matters ranging from tax to commercial litigation. Diego is eager to use his legal skills after graduation to continue working in business law and bring attainable solutions to a growing diverse business community in Oregon.

Zach Schick
Willamette University

Zack Schick is in his final year of the JD/MBA program at Willamette University. Having worked in California, Oregon, and Texas, and volunteered abroad in Tanzania and Belize, Zack has pursued opportunities where he can offer real change. Through law school, Zack has worked with the Oregon Department of Justice, first clerking with the Special Litigation Unit, and currently with the Tax and Finance Section. He hopes to use the skills from the JD/MBA program and clerkships to start a meaningful legal career in Oregon.

Victoria Nguyen
University of Oregon

Victoria Nguyen is the operations editor for the Oregon Law Review and a lifelong Oregonian. She has served as a legal research and writing tutor and was an extern for the U.S. District Court for the District of Oregon. Victoria looks forward to joining Hershner Hunter LLP as an associate in the fall.

Job Postings

Sussman Shank LLP

Sussman Shank LLP, a mid-sized, full-service law firm in Portland, has the following positions open.

Trust and Estate Tax Lawyer

The firm has an immediate opening in its business practice group, for a motivated tax lawyer who focuses his or her practice on taxable estate planning, trust and estate administration, closely-held business succession planning, and related transactions. The position requires strong academic credentials and excellent written and oral communication skills. An ideal candidate has completed an LLM program in tax (or has comparable tax experience), has experience working directly with high-net-worth clients, and has the capacity for, and shows dedication to, business and practice development.

Business Transaction Attorney

The firm has an immediate opening in its business practice group for an attorney with 6 to 15 years of experience to handle a broad range of business transactions (e.g., mergers and acquisitions, sales and purchases of real estate and business operations), real and personal property based financing, business formations, and general corporate work. IP, tax, securities, land use or environmental law experience a plus. The position requires strong academic credentials and excellent written and oral communication skills. An ideal candidate has the capacity for and shows dedication to business and practice development.

Please address cover letters and resumes to our Chief Operating Officer, Steven T. Seguin. Visit Sussman Shank's website for information on the firm and its attorneys at www.sussmanshank.com.

Competitive Benefits and Compensation. Ranked one of the 100 Best Companies to Work for in Oregon. Sussman Shank is an qual opportunity employer.

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Vestas

Vestas designs, manufactures, installs, and services wind turbines across the globe.

Senior Specialist, Legal & Contracting

The Corporate Counsel provides legal support for Vestas, the established global provider of wind power plant solutions, in the United States and Canada. The department is responsible for drafting, reviewing, and negotiating wind power plant sales, operations, and maintenance, and other related agreements; effectively coordinating external counsel; interacting with global legal and business colleagues on multi-jurisdictional transactions and initiatives; and advising clients on complex transactions and interesting legal issues. This position will support Vestas' sales business unit headquartered in Portland, Oregon and may support other business units throughout the United States as needed.

We offer an attractive salary and one of the most comprehensive benefits plans in the industry. Among the many amenities we offer are healthcare, dental and vision care, paid time off, a generous 401(k) plan, tuition assistance, and much more

It is the policy of Vestas to afford equal employment opportunity without regard to age, race, religion, color, gender, or national origin, and to afford equal opportunity to veterans and people with a disability, or any other characteristic protected by federal, state, provincial, or local law.

Details of responsibilities and qualifications are at: https://careers.vestas.com/job/Portland-Corporate-Counsel-OR-97209/635137801/

Buckley Law PC

Buckley Law PC is located in Lake Oswego, and provides a broad range of specialized services in business and commercial law, employment and labor law, real estate and construction, civil litigation, intellectual property, taxation, family and elder law, and estate planning, probate, and trust administration.

Attorney–Business, Tax, Estate Planning, and/or Real Estate (Shareholder)

Are you an attorney with 10 years or more experience in business, tax, real estate, and/or estate planning? Are you interested in joining a firm in which employees have ranked it to be a top workplace in Oregon?

Buckley Law P.C. is looking for attorneys to join our firm, particularly as senior partners begin transitions of their practices over the next 2-5 years. With a collegial group of partners in place, strong support staff, and talented associates, this is a great opportunity for entrepreneurial, business-oriented, and client-focused attorneys to manage and cultivate already successful books of business.

The ideal Attorney (Shareholder) will have:·

- At least 10 years of estate planning, business, real estate, and/or tax experience
- Excellent skills and expertise in their area(s) of law
- Deep knowledge in at least two of the four areas—Business, Tax, Real Estate, and Estate Planning
- Superior client management skills, client service focus, and track record of providing value to clients
- Established client development talent
- 5+ years of experience managing legal staff, associates
- Emotional intelligence
- LL.M. or JD/CPA combination (desired but not required)

To apply for immediate consideration, please send a resume to resumes@buckley-law.com with a cover letter.