



PARTNERSHIP AND CLOSELY HELD BUSINESS CONFLICTS IN THE AGE OF COVID-19

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PARTRIDGE
SNOW &
HAHN_{LLP}

AGENDA

- Introductions
- The New Normal
- Business Challenges
- Litigation
- Ways to Avoid or Mitigate Conflicts
- Bankruptcy and Liquidation



Daniel E. Burgoyne
Litigation
401-861-8254
dburgoyne@psh.com



Christopher C. Cassara
Business Law
774-206-8200
ccassara@psh.com



Suzanne M. Elovecky
Litigation
857-214-3097
selovecky@psh.com



Andrea N. Jacobs
Business Law
857-214-3099
ajacobs@psh.com



Brian J. Reilly
Business Law
617-292-7900
breilly@psh.com



Russell J. Stein
Tax/ Nonprofit/ Business Law
857-214-3128
rstein@psh.com

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SNOW &
HAHN** LLP

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THE NEW NORMAL

- Work from home
- Early September - high unemployment rate – MA 14.5%, RI 12.4%
- Political Uncertainty
- Social unrest
- Economic Uncertainty

BUSINESS CHALLENGES

Panelist Discussion

BUSINESS CHALLENGES

☞ Many businesses, particularly those relying on indoor activities or gatherings, are in distress:

- Restaurants & Bars
- Gyms & Yoga Studios
- Personal Services
- Medical
- Daycare
- Entertainment Venues
- Travel
- Retail

☞ Distress affects those interacting with the business:

- Employees
- Vendors
- Government (regulatory & compliance)
- Landlords
- Lenders & other creditors

☞ Effects:

- Intraowner disputes, partner expulsions, realignments, dissolutions
- Allegations of fraud, mismanagement
- Closing or restructuring business

☞ What areas are the source of the conflict?

- Sales
- Employee Relations
- Landlord Relations
- Cashflow
- Vendor Relations
- Higher Cost / Compliance Issues

BUSINESS CHALLENGES

🚩 Areas to Assess

- Contractual relationships with employees, key vendors
- Leases
- Bank relationships
- Company internal governing documents
- Tax implications
 - Partnerships / LLC
 - S corporations

CONFLICT MITIGATION

Panelist Discussion

WAYS TO AVOID OR MITIGATE CONFLICTS

🇺🇸 Tenant Leasing considerations and best practices

- Termination Rights
 - General opt-in early termination provisions
 - More limited termination provision tied to business performance
 - More expansive permitting contingencies, and additional time built into industry specific contingencies (e.g., extended timeframes to obtain liquor licenses)
- Creative Rent Structures
 - Longer free rent periods
 - Larger TI allowances
 - Percentage rent only periods
 - Rent deferral/abatement tied to easing COVID restrictions or other metrics (e.g., if a retail location is located on the first floor of an office building, tie rent obligation to building operating at a specific percentage capacity.)

WAYS TO AVOID OR MITIGATE CONFLICTS

⚖ Performance Obligations

- Build Outs – Tenant Work/Landlord Work
 - Often tied to set timeframes and benchmarks
 - Rent commencement implications
 - Default implications
- Continuous Operating Provisions (mainly retail/hospitality)

⚖ Force Majeure Clauses

- Typically excuse performance by NOT rent
- In past, have not included specific “epidemic/pandemic” language

⚖ Personal Guaranty

- Limited v. Unlimited

WAYS TO AVOID OR MITIGATE CONFLICTS

- ⌚ In theory bankruptcy can be used, particularly to facilitate a sale, but other avenues are likely better
 - Receiverships and other court-supervised proceedings
 - ADR: Mediation and arbitration
- ⌚ How can the Company's organizational documents help (Bylaws, Shareholders Agreement, Operating Agreement)?
 - Important provisions in shareholders / operating agreements
 - Voting/decision-making issues and dispute resolution (mediation / arbitration)
 - Buy / sell provisions (death, disability, departure of partner)
 - Valuation considerations and issues

SHAREHOLDER AND MEMBER REDEMPTIONS/BUYOUTS

- Structure – Redemptions versus cross-purchases
- Purchase price and valuation considerations
- Financing and other terms of Payment
- Tax and accounting considerations
- Confidentiality, Non-Disparagement and other covenants
- Release of Claims
- Administrative tasks

LITIGATION

Panelist Discussion

LITIGATION

- To Avoid Unnecessary Litigation:
 - Prioritize Maintenance of Books & Records
 - Update / Revise Partnership / Shareholder Agreements to reflect current processes
 - Minority shareholders entitled to an accounting; shoddy record keeping can be costly
 - Do not resort to “self help” – if there are issues with a shareholder, follow the agreement and consult with counsel; do not change pay, access, or other elements without confirming legality.
- When Litigation may be necessary
 - If you are a minority shareholder being frozen out
 - Derivative actions to protect company
 - Eject a non performing partner
 - Valuation disputes
 - Judicial Dissolution

DEALING WITH DEBT

Panelist Discussion

DEALING WITH DEBT

- Includes lenders, trade debt, landlords, taxes
- What legal remedies are available to closely held businesses facing credit problems?
- What problems can bankruptcy solve and when should I start evaluating it?

WORST-CASE SCENARIO: CLOSING AND LIQUIDATING THE BUSINESS

- ⌚ Different ways to do it.
- ⌚ Owners may have fiduciary duty to creditors
- ⌚ Bankruptcy or receivership can provide a supervised, orderly liquidation
- ⌚ Negotiated settlements with major creditors
- ⌚ Sometimes better to simply close doors & walk away

SAVING THE DISTRESSED BUSINESS

- Curing lease defaults
- Restructuring secured loans
- Eliminating unsecured debt
- Disposing of underperforming divisions, contracts, or assets.

PROBLEMS BANKRUPTCY PROBABLY CANNOT SOLVE

- ⌚ Can't create demand for your product or service.
- ⌚ Can't force vendors, suppliers to do business with you.
- ⌚ If you cannot cure a lease default, the landlord has the right to evict – eventually.
- ⌚ Secured creditors generally entitled to be paid, eventually, or can recover collateral.



Daniel E. Burgoyne
Counsel
401-861-8254
dburgoyne@psh.com



Christopher C. Cassara
Counsel
774-206-8200
ccassara@psh.com



Colin A. Coleman
Partner-In-Charge, Boston
781-474-5125
ccoleman@psh.com



Suzanne M. Elovecky
Counsel
857-214-3097
selovecky@psh.com



David M. Gilden
Partner
401-861-8230
dgilden@psh.com



Andrea N. Jacobs
Associate
857-214-3099
ajacobs@psh.com



Brian J. Reilly
Associate
617-292-7900
breilly@psh.com



Lawrence J. Sheh
Partner
781-474-5126
lsheh@psh.com



Russell J. Stein
Of Counsel
857-214-3128
rstein@psh.com



Randall T. Weeks
Partner-In-Charge, SouthCoast
774-206-8291
rweeks@psh.com

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