

# COVID-19 Revenue Protection Plan

## Protecting Your Cash Flow During a Pandemic

COVID-19 is straining cash flow to a historical extent. When every dollar counts more than ever, you should take steps to protect your business at each stage of its relationships with customers, clients, and business partners.

Below are strategies to best position your company to confront bad debt, slow-paying (or delinquent) accounts, bankruptcy, or litigation.

Of course, there is no “one size fits all” to structuring (or enforcing) a commercial deal. However, the commercial decisions you make now will determine how successfully your business will weather this storm. You may have to initiate some uncomfortable conversations that are necessary to keep your business successful.

### LEVEL 1 Structuring the Deal

#### Do your best to protect your business up front.

- Perform vigorous credit checks
- Demand payment references
- Demand collateral
- Demand a deposit/retainer
- Demand progress payments
- Alter your typical billing cycle (if 30 days, shorten it to 15)
- Require a cognovit note or “confession of judgment” in the event of a default
- Require a promissory note of individual guarantors

#### Terms and Conditions Worth of Your Special Attention

*Damage limitations, default provisions (what constitutes a default), venue selection, indemnity obligations, and attorney’s fees obligations in the event of litigation*

### LEVEL 2 Late Payments and Unreturned Telephone Calls

#### You know all the signs. This debt is going bad, and it is time to take action.

- Issue a bill for everything in the pipeline. Now. Even if it is out of the billing cycle.
- Pick your battles: In the midst of a national crisis disproportionately impacting some industries (such as healthcare and hospitality), now may not be the time to vigorously pursue collections. However, some industry sectors are doing well, and they should receive your top attention.
- Send a demand letter from your legal counsel requiring payment by a certain date
- Send a litigation hold notice
- Make certain that your employees are instructed to save all correspondence, communications, and documents related to the commercial dealings
- Gather all communications, documents, and evidence germane to the account
- If structuring a deal, get as much money as you can up front to avoid a preference claim in the event of bankruptcy
- Put systems in place to determine which accounts are starting to slip into delinquency
- Consider offering a forbearance agreement if the circumstances are appropriate

### LEVEL 3 Litigation and Bankruptcy

#### You read the signs correctly. You now are either litigating or have a business partner that has filed bankruptcy

#### LITIGATION CONSIDERATIONS

- All courts will face a significant backlog of cases when normal business operations resume. This means it will take time (and cost money) for your business to recover.
- Act fast—do not succumb to requests for delay or promises of payment
- If you sent a written demand letter (see Level 2), commence litigation as soon as the deadline to pay expires
- If you received a cognovit note or confession of judgment (see Level 1), enter that note or judgment ASAP
- File the complaint in a sophisticated jurisdiction, especially one with an active commercial docket
- Serve the complaint promptly, and do not fall for repeated requests for extensions of time to respond
- If in federal court, consider consenting to proceeding before a magistrate judge to expedite proceedings
- Serve targeted discovery to establish the defaulted debt obligations ASAP
- As soon as the deadline for the defendant passes, seek entry of default and a default judgment
- Order an asset search, and enforce judgment promptly before the defendant moves assets

#### BANKRUPTCY CONSIDERATIONS

- If a bankruptcy is filed, don’t delay—get bankruptcy counsel involved ASAP
- Cease collection efforts to avoid allegations that you violated the automatic stay (including phone calls, texts, collection letters or emails, etc.)
- File a proof of claim
- Review any financing documents closely to ensure your judgment lien (or any other lien) is not primed
- Review the plan of reorganization or liquidation and vote on the plan
- Review any releases of the debtor or third parties that may be hidden in the plan
- Watch for litigation to avoid any preferential payments
- If you receive a preference demand, do not pay it—there are dozens of available defenses that can eliminate or greatly reduce your exposure

#### For more information

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