

# Commercial Counsel

## General Discussion Relating to Business Legal Issues

The information contained herein is not provided as legal advice. Legal advice should be sought as to any factual and legal issue.

Autumn 2009

### ACCELERATE DEBT RECOVERY ***NOW!*** BUSINESS BANKRUPTCIES TO RISE INTO 2010

If we are lucky, we have reached the end of the recession. Commercial markets are already slowly improving and recent corporate earnings reports show that many companies have cut costs drastically and are paying off debt and building cash reserves. **Unfortunately, most have not, but all will soon be rosy for creditors, right?**

**Wrong!** In all of the recessions that KMKSC has guided clients through since the 1930's, many businesses make the mistake of relaxing their focus on problem debt as soon as there is the first sign of economic improvement. **Unfortunately, those that do so expose themselves at the worst possible time.**

We have experienced a significant contraction in business and consumer spending. When this is combined with credit famine it creates a very serious evaporation of cash flow, which is so vital to a healthy economy. All this has hit most businesses very hard. Plus there is a great deal of debt on the balance sheets of corporate America, due in part to the free lending banking environment that preceded the recession. Many of these loans are due to mature, creating yet another very serious environment. Any improved credit market will only help the strongest borrowers, which are generally the firms that don't need additional loans to survive. Even if a troubled business is able to obtain credit, the cost to it will be increased, providing little help in stabilizing the financial worth of the company.

*"The importance of money flows from it being a link between the present and the future."*

John Maynard Keynes

Many "lesser" companies are hanging on, hoping this "lift off" in economic activity will enable them to service existing liabilities before operating capital runs out. For such "troubled firms" the threshold of survival is running out. New financing is difficult to find, and will often only inflate costs and expenses.

Standard & Poor's, the respected corporate credit rating agency, predicts that bankruptcies of speculative grade companies will not peak until the first quarter of 2010. **It predicts a default rate of over 14% in the first months of next year, compared with less than 10% in June of this year and 0.8% in November 2007.** Believe us when we tell you, **now is the time to be diligent in recovering debt.** The importance of acting swiftly to recover any delinquent account cannot be underestimated.

Escalate wisely: Don't waste time with "wishful thinking." Early referral to KMKSC puts you to the front of the line of the debtor's attention. A law firm letterhead and demand letter quickly enables determination of whether amicable recovery of the delinquent account is possible, or whether legal action is needed while there is a reasonable opportunity that your debtor is still viable to provide collection. Get off the "starting block" quickly so that you are able to win the "race" with the other creditors chasing your delinquent debtor. Any questions in that regard should be directed to Steve Kailas of our firm at 414-9962-5110 to get moving on any overdue accounts: Your bottom line will be better for it.

### BOARD MINUTES THAT MINIMIZE LIABILITY

Too often our litigators and corporate attorneys have faced problems stemming from vague or contradictory records of board meetings. This defect can cause serious personal and corporate liability and expense. In many cases this can be avoided or ameliorated simply by implementing the following general guidelines for documenting board meetings.

If your corporate rules do not already specify, agree on a resolution whereby one person (or position) is allocated responsibility for minute taking and who will create the only officially recognized record. Ideally, this should include basic parameters for doing so, including the following.

Meeting notes should be restricted to objective content and exclude the personal insights of the note taker. Draft minutes should be quickly circulated to each board member and should be actively reviewed for discrepancies by them. Each member should then return explicit approval or written corrections. The minute taker should incorporate such changes, or note any discrepancies raised, in the final version of the minutes that should be distributed in advance for affirmative approval by the board at its next meeting.

Minutes should not be cursory or verbatim. It is important to capture the nature of the discussion in terms of both content and tenor. Minutes should clearly illustrate the diligence of the board members and their reactions to the agenda. Minutes should include the themes of significant concerns or arguments and detail who made or endorsed them. The subject matter of presentations and the identity and source of any documents or third party materials considered by the board should be recorded.

Record the start and end times for each substantive item discussed, not merely for the meeting as a whole. If a vote is taken, record who abstained or opposed the outcome as well as the nature of the decision adopted.

Minutes are important. By recording the tenor and focus of discussions together with details of individual reservations and positions and the time spent on them—and employing a careful review and approval process, the minutes become not only an authoritative record, but also one that will supplant faded memories of participants. **Adopting even these basic guidelines should help to curtail potential disputes that may arise and reduce certain types of liability for both the corporation and individual board members.**

Of course, there are additional situations that require more specific advice and additional steps required to fully manage liability as an individual director or corporation. If you have questions as an individual or on behalf of your corporation, contact Alexander “Sandie” Pendleton (apendleton@kmksc.com) at (414) 962-5110.

### **SUPREME COURT REVITALIZES POWERFUL TRADE REGULATION STATUTE (RICO)**

The U.S. Supreme Court recently opened the door to renewed aggressive enforcement of the Racketeer Influenced and Corrupt Organizations Act (RICO). Originally aimed at “Mafia-style” organized crime syndicates, RICO was drafted so broadly that it quickly became a major tool for both civil and criminal enforcement against anyone even indirectly associated with allegedly criminal activity—including accountants, bankers, insurance companies, securities firms, and major corporations, such as General Motors, and their executives. RICO penalties are very severe (for example, the civil RICO statute provides for automatic trebling of damages), and as a result, businesses named as RICO defendants were being forced to settle—regardless of their actual guilt or innocence—due to the amounts at stake.

In 1993, the Supreme Court responded to such concerns by requiring “operational management involvement” in the criminal activities alleged in order for RICO liability to attach. It held that, for example,

accountants who had audited a business accused of criminal activity only a few times did not have the necessary level of involvement in the accused business’ activities. Faced with such a high bar, both civil and criminal RICO actions dwindled dramatically.

But, this summer the Supreme Court may have gone a long way to putting RICO concerns back on the radar of legitimate businesses. While some “managerial-type” involvement is still required in order to be held liable, this may be found by simple inaction or *ad hoc* decision-making that is demonstrably linked to the wrongdoing. **There does not need to be any structure, simply some continuing connection between the wrongdoing and the individual or entity at issue.**

The result is that, unless one can show completely independent and autonomous decision-making, involvement found to have formed a small but necessary part of a wider pattern of illegal acts may be sufficient to create individual or corporate RICO liability. Participation in transactions later linked to a criminal act, or failure to identify business failings related to services for which one is retained could represent “managerial involvement” in a course of criminal activity.

**The severity of RICO penalties has not been reduced. Now that the barrier to bringing such actions has been lowered, companies may wish to increase their awareness of the risk of RICO liability and the severity of the associated penalties.**

KMKSC’s complex litigation department has considerable experience in the defense and prosecution of civil RICO actions. Should you or your company have provided services or advice to, or transacted with, anyone that you believe may have been involved in illegality that might rise to the level of a RICO “criminal enterprise”, contact Robert Gegios (rgegios@kmksc.com) at (414) 962-5110 to determine how best to protect your interests.

### **LATEST SPEECHES AND PRESENTATIONS BY KMKSC ATTORNEYS**

- October, 21, 2009 - **“What to do “Up Front” to Minimize Collections Problems: Then, *IF* Things Go Bad”** KMKSC shareholder David S. Chartier, 2009 Credit Professional’s Conference, Wisconsin Credit Association, Brookfield WI.
- October, 21, 2009 - **“Customer in Bankruptcy or Receivership? What You Need to Know!”** KMKSC shareholder Samuel C. Wisotzkey, 2009 Credit Professional’s Conference, Wisconsin Credit Association, Brookfield WI.
- September 11 & 16 and November 18 – **“Construction Lien & Bond Claims: Make Them Pay”** KMKSC shareholder David S. Chartier, Wisconsin Credit Association ½ Day Workshops, Oshkosh, Oconomowoc & Madison, WI.

### **MOST RECENT PUBLICATIONS BY KMKSC ATTORNEYS**

- **WISCONSIN DISCOVERY LAW AND PRACTICE**, 3<sup>rd</sup> ed., 2009 Supplement, Chapters I & II, *“Introduction to Discovery”* and *“Scope of Discovery,”* Robert L. Gegios and Stephen D. R. Taylor, State Bar of Wisconsin.
- **THE LAW OF DAMAGES IN WISCONSIN, Volume III**, 2009 Supplement, Chapter 30, *“Mitigation of Damages,”* Robert L. Gegios and Stephen D. R. Taylor (with John W. Hein), State Bar of Wisconsin.