

Financially Distressed Suppliers – Applying Best Practices



Gordon J. Toering and Susan M. Cook

January 16, 2020

© 2020 Warner Norcross + Judd LLP

These materials are for educational use only. This is not legal advice and does not create an attorney-client relationship.



Warner Norcross + Judd



Gordon J. Toering

Chair of Warner's Restructuring and Insolvency Practice Group

27 years of experience in:

- ◆ Bankruptcy, creditors' rights, collection and insolvency law
- ◆ Commercial and business law

Susan M. Cook

35 years of experience in:

- ◆ Bankruptcy, business reorganization
- ◆ Commercial and business law
- ◆ Litigation



Distressed Suppliers

Pre-bankruptcy Strategies

1. Review supply base to detect signs of trouble

- ◆ Consider implementing supplier review program
 - ◆ Require financials from key suppliers
 - ◆ D&B may be of some help
 - ◆ Supplier's performance may be a sign



Distressed Suppliers

- ◆ Privately-owned suppliers may push back on providing financials
 - ◆ Look at contract terms and conditions
 - ◆ Possible middle ground resolutions



Distressed Suppliers

Pre-bankruptcy Strategies

2. If you have concerns about a supplier's financial condition, then review the key terms of the contractual terms and conditions to understand your rights:
 - ◆ Requirements contract?
 - ◆ Ability to re-source and how long will it take?
 - ◆ Duration of the contract?
 - ◆ Termination/exit rights?
 - ◆ IP issues?
 - ◆ Tooling or equipment issues? If so, is there a bailment agreement in place?



Distressed Suppliers

Pre-bankruptcy Strategies

3. If serious concerns about a supplier, consider making a demand for adequate assurance of performance under UCC 2-609
 - ◆ May have limited value if you cannot re-source easily



Distressed Suppliers

Pre-bankruptcy Strategies

4. Consider engaging in negotiations to modify contractual terms (need leverage because supplier may push back)



Distressed Suppliers

Pre-bankruptcy Strategies

5. Other actions that can be taken include the following:

- ◆ Building parts bank if supplier has capacity
- ◆ Actively review other sources of supply and potentially begin re-sourcing (even building tools if necessary)



Distressed Suppliers

Pre-bankruptcy Strategies

6. If forced (last resort), provide financial support in return for an access and accommodation arrangement:
 - ◆ Reduced payment terms
 - ◆ Pay for finished goods and raw materials on hand
 - ◆ No setoff
 - ◆ Price increase
 - ◆ Limitations on resourcing
 - ◆ Loans
 - ◆ Need to understand other customers' needs (fair allocation)



Distressed Suppliers

Post-bankruptcy Strategies

1. The automatic stay may limit exercise of remedies:
 - ◆ Likely prohibits resourcing or terminating contracts
 - ◆ Limits setoff (but not recoupment)



Distressed Suppliers

Post-bankruptcy Strategies

2. Close monitoring of the supplier's bankruptcy is required:
 - ◆ DIP (debtor in possession) financing
 - ◆ Review monthly operating reports showing financial results
 - ◆ Identify signs that the supplier may sell assets as a going-concern (Section 363 sale) or wind-down operations

Distressed Suppliers

Post-bankruptcy Strategies

3. Supplier has the right to “assume” or “reject” contracts

- ◆ Assumption means the supplier will continue the contract. All defaults need to be cured, but it may require prompt action.
- ◆ Supplier could reject “unprofitable” contracts – if rejected, will need to negotiate pricing or other terms to continue supply
- ◆ Must be careful to review all possible notices of assumption or rejection

Distressed Suppliers

Post-bankruptcy Strategies

4. Consider taking actions that do not violate the automatic stay, including:
 - ◆ Building parts bank
 - ◆ Exploring alternative vendors (although re-sourcing may be prohibited or limited)

Distressed Suppliers

Post-bankruptcy Strategies

5. Bankruptcy court assistance may be limited (tend to be pro-debtor)



Q&A

Gordon J. Toering
Warner Norcross + Judd LLP
1500 Warner Building
150 Ottawa Ave NW
Grand Rapids, MI 49503
gtoering@wnj.com
616.752.2185

Susan M. Cook
Warner Norcross + Judd LLP
715 E. Main Street
Suite 110
Midland, MI 48640
smcook@wnj.com
248.784.5194

Thank you!

