Insights: Alerts

# The Philadelphia Commerce Court Establishes a Temporary Financial Monitor Program

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*Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main COVID-19 Task Force page and/or your email for updates.*

We previously wrote several alerts addressing contract defenses, including *force majeure*, frustration of purpose and impracticability, available in several states (COVID-19 contract section). These alerts address how parties to a contract may allocate the risks and losses resulting from the COVID-19 pandemic and government stay-in-place orders. Over the last two months, numerous lawsuits have been filed seeking relief because of COVID-19 and raising these defenses to non-performance. This alert addresses the creative approach adopted by the Philadelphia County Commerce Court to manage its COVID-19 docket and facilitate prompt and fair resolutions.

On June 22, 2020, the Commerce Court issued an order creating the *Commerce Court Temporary Financial Monitor Program* to provide a forum for local for-profit businesses and non-profit institutions who "have been unable to generate sufficient income to pay their debts and retain their staff" and for whom "the current economic climate threatens their ability to operate in the future . . . ." *Financial Monitor Order*, at 1.

The Commerce Court has taken judicial notice that the COVID-19 pandemic and stay-in-place orders have had, and are having, a dramatic, disruptive impact on for-profit businesses and non-profit institutions. Their "business models" are not working, are not likely to work for a while and may never return to a functioning business model. The Commerce Court also has taken judicial notice that the COVID-19 disruption has, and is, preventing these businesses from generating sufficient revenues to pay ordinary monthly expenses, meet payroll and service debt obligations.

To address these issues, the Commerce Court has developed the *Financial Monitor Program* to allow these entities to bring their creditors and stakeholders before a *Financial Monitor* to work out a new business model, where possible, and if not, to wind up its business affairs in a reasonable and fair manner. The one-stop approach to mediate and allocate the risks and losses to allow entities to continue conducting business in the post-COVID economy offers a reasonable approach for developing a new business model acceptable to the entity, creditors and other stakeholders.

**Commerce Court Temporary Financial Monitor Program**

**Who is eligible to participate in the Financial Monitor Program?** A for-profit company or a non-profit institution whose principal place of business is located in Philadelphia is eligible if that entity has "ceased to conduct a substantial portion of its operations due to the COVID-19 pandemic, resulting in loss of revenue and causing the entity to be unable to pay its usual and customary costs and expenses coming due in the ordinary course on and after March 1, 2020." *Financial Monitor Order*, at 1. The Order **excludes** entities "whose defaults or failure to pay costs and expenses occurred on or before February 29, 2020" unless the court determines to allow such an entity to participate despite the pre-March default. *Financial Monitor Order*, at 1.

**How is participation initiated?** The defaulting entity must file a petition with the Commerce Court seeking to be assigned to the Financial Monitor Program. The Petition must include financial information for the pre-COVID period (before March 1, 2020) and post-COVID period (March 1 and continuing) showing assets, revenues, costs, expenses, debts, the identity of creditors and amounts owed to each of them. The Petition is a public document. The financial information may be filed under seal and withheld from the general public. The information would be made available to creditors.

**Role of a Financial Monitor:** The Petition is assigned to a supervising judge. A supervising judge may take one or more actions. The Order encourages the supervising judge to appoint a legal or accounting professional to serve as a *Temporary Financial Monitor* who will have the authority to meet with creditors to address the financial condition of the petitioner. Importantly, the *Temporary Financial Monitor* will have the authority to enjoin creditors from engaging in collection activities against the petitioner and its assets, require the petitioner to post a nominal bond and direct any other actions an equity court may deem appropriate. After reviewing the financial information and consulting with creditors, the *Temporary Financial Monitor* will develop a proposed Operating Plan that should enable the petitioning entity to resume or continue operations and pay its accumulated debt.

**Term:** The term of the *Temporary Financial Monitor* is one year unless extended by the court.

**Opportunity for COVID-Impacted Entities:** The Temporary Financial Monitor Program is viable because the jurisdiction of the Commerce Court is broad and it may hear equity claims. The Commerce Court jurisdiction encompasses business-to-business disputes involving contracts, foreclosure, and dissolution for those businesses and non-profit institutions resident in Philadelphia County. This broad jurisdiction allows it to assert jurisdiction over key contracts and business relationships to ensure all with a stake are before the Court. While the authority to enjoin creditors may raise issues concerning federal and state bankruptcy and insolvency proceedings, the *Temporary Financial Monitor Program* sends a clear signal the Commerce Court wants the parties to work together to address the revenue shortfalls caused by the COVID-19 pandemic and develop a workable business plan going forward.

Not all jurisdictions have a business court and not all business courts have as broad authority as the Commerce Court. Nevertheless, entities adversely impacted by COVID-19 should consider filing actions in state courts that can hear all claims and disputes that involve all of their creditors and contracting parties. These entities should seek appointment of a *Financial Monitor* to assist in developing a new business model that allows them to flourish in a post-COVID economy.

## Related People




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