NEWSLETTER

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Application for restructuring v. liability of a members of the management board of the limited liability company

On January 1, 2016 will come into force Restructuring Law, introducing to the Polish legal system four types of restructuring procedures and amending several laws. **Following the entry into force of the Restructuring Law, among other things, the conditions of liability of members of the management board of the limited liability company for the company's obligations pursuant to Art. 299 of the Commercial Companies Code (hereinafter referred to as 'CCC') will be modified.** In this context, we see one issue of particular, practical importance that we would like to introduce you in this newsletter.

1. On the basis of current legislation, member of the management board - to be freed from liability under Art. 299 CCC - should demonstrate:

· that the application for bankruptcy was filed or arrangement procedure was initiated in due time,

or

· that the failure to file application for bankruptcy and the failure to start arrangement procedure was not his fault,

or

· although application for bankruptcy wasn't filed and arrangement procedure wasn't initiated, creditor was not injured.

2. We underline that in connection with the introduction of four new types of restructuring procedures, conditions for the release from liability of members of the management board of the limited liability company under Art. 299 CCC will be also changed. From January 1, 2016 member of the management board of the limited liability company will be freed from liability for the company's obligations, if he proves:

· that the application for bankruptcy was filed in due time or at the same time a decision on the opening of restructuring procedure or on the arrangement approval in the proceeding in approval of the arrangement procedure were issued,

or

· that the failure to file application for bankruptcy was not his fault,

or

· although the application for bankruptcy wasn't filed and the failure to issue a decision on the opening of restructuring procedure or decision on no approval of the arrangement in the arrangement procedure, creditor did not suffer a damage.

3. In our opinion, the content of the first presented premise, after the changes that will enter into force on the 1st of January 2016, is very important. **It should be noted that the application itself, submitted in due time, for the opening of restructuring procedure or application for arrangement approval, will not release member of the management board of the limited liability company from the liability of the company's obligations. Such the effect will have a court's decision on opening of restructuring procedure or decision on arrangement approval.**

As a result, member of the management board, by submitting the application for restructuring, in the face of the threat of insolvency of the company or the creation of insolvency state, takes two risks:

a) tardiness of the restructuring court in recognizing application,

b) the possibility of rejection of the application.

Therefore, we can say that by submitting application for restructuring, member of the management board of the limited liability company is never 'completely safe'. The direction and mode of action of the restructuring court - to which member of the management board has no effect on - can derive an indirect effect on management board member's liability for the obligations of the limited liability company - in the absence of the fulfillment of the other conditions for release from liability.

4. Member of the management board of the limited liability company should remember that in order to effectively discharge itself from liability for the obligations of the company, application for the opening of restructuring procedure or application for arrangement approval wouldn't be sufficient. We point on two possible options for action in connection with the planned restructuring:

a. In the event that at the time of application for opening of restructuring procedure or application for arrangement approval, the state of insolveny of the comany did not exist:

· after filing an appropriate application, member of the management board should constantly monitor the financial situation of the company. In the case of the fulfillment of the conditions for insolvency, member of the management board should submit application for bankruptcy. Recognition of that application will be suspended by a court

until recognition of application for restructuring - but member of the management board will be safe, because he filed application for bankruptcy in a timely manner,

· **possibly, member of the management board may, together with application for the opening of restructuring procedure or application for arrangement approval, file application for bankruptcy affected by formal defects.** The recognition of application for bankruptcy will be suspended until recognition of application for restructuring. From the courts's practice it will depend whether the court will wait with the call to fill the formal gaps of application for bankruptcy until recognition of application for restructuring or will not wait. In the event that the restructuring court dismissed the debtor's application for restructuring and, on the other hand, state of insolvency haven't been possible, while not elapse yet deadline to fill the formal gaps in the application for bankruptcy - member of the management board will be able to simply not to complete the application for bankruptcy.

b. In the event that at the time of application for opening of restructuring procedure or application for arrangement approval the state of insolvency of the company already existed - in this case, in parallel with the restructuring application, application for bankruptcy must be submitted. In case when a member of the management board stipulates that the financial condition of the company may soon significantly improve, it can be sensible to file application for bankruptcy affected by formal defects.

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