



TRADE CREDITOR'S POST-FILING CHECK LIST WHEN A CUSTOMER FILES FOR BANKRPUTCY©

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We have recently posted several comments on how manufactures of goods can and should protect themselves when faced with an insolvent vendor who files for relief in bankruptcy court. The Bankruptcy Code and the UCC as enacted in your jurisdiction provide protections to trade creditors who have supplied goods or services to a customer either before or during the bankruptcy case. It is essential that trade creditors arm themselves with all of the tools in the Bankruptcy Code/UCC toolbox when faced with this seeming inevitable business event. The following checklist is designed to educate trade creditors as to their rights, remedies, and obligations when faced with an insolvent vendor who files for relief under the Code.

- Immediately review the business relationship. Pull all contracts with the Debtor and review all payments and shipments during the 90-days prior to the filing date. Make sure that the Debtor entity is the business with which you transacted business. Determine if you conduct any future business on a COD or cash in advance basis.
- Gather all information on the bankruptcy case and monitor the case filings. Determine from a review of PACER whether the case is a chapter 11 reorganization or a chapter 7 liquidation. Obtain copies of filed documents which bear on your claims against the estate such as cash collateral and DIP funding orders. File a Notice of Appearance to receive future papers filed in the case. Attend the first meeting of creditors to examine the Debtor's representatives on the Debtor's (or Trustee's) assets, liabilities, and intentions in the case. And, begin a collection of documents required to defend any preference claims for payment received from the Debtor in the 90-day period just before the case filing.
- Avoid violating the automatic stay. Cease all collection activities and inform counsel and your employees to have no further contact with the Debtor. Cease all litigation designed to collect on the debt and inform the court of the bankruptcy filing. The automatic stay is one of the most powerful tools in the Debtor's toolbox and all steps must be taken to avoid even an inadvertent violation of the automatic stay. If post-petition business is

conducted with the Debtor, be careful to separate pre- and post-petition business on invoices and apply payment correctly.

- After consultation with counsel, institute relief from stay proceedings. Exercise all available UCC rights including stoppage of goods in transit, reclamation claims, and setoff rights.
- As early as possible, confirm the Debtor's right to use cash collateral. Any post-petition goods supplied to the Debtor are entitled to priority as an administrative claim against the Estate. However, before providing post-petition goods or services to the Debtor, and before accepting payment for these goods or services: (a) determine whether the payments would constitute cash collateral by checking if a creditor has a valid lien on the Debtor's cash collateral or blanket lien on all of the debtor's assets; (b) if the payments would constitute cash collateral, demand to see cash collateral order giving the Debtor court approval to use cash collateral or confirm the secured creditors with an interest in the cash collateral have consented; (c) consider requesting a specific line item on a cash collateral or DIP financing budget that references the seller and authorizes continued payments to it; and (d) ensure that the court or secured creditor has not revoked this authorization before making each shipment and before accepting each payment.
- Stop delivery of goods in transit. For any goods sold to the Debtor on credit terms, the UCC and Bankruptcy Code contain powerful tools which can be used to freeze goods in transit, force return of goods not in the possession of the Debtor, or to enforce priority status for goods received by the Debtor prior to the filing date. (See UCC 2-702, 703, 705 and §§ 503(b)(9) and 546(c) of the Bankruptcy Code.) We have recently written on this issue. <http://www.jhindslaw.com/wp-content/uploads/2016/06/Decline-in-Retail-War-Between-Lenders.pdf>; <http://www.jhindslaw.com/wp-content/uploads/2016/06/Reclamation-Claim-Part1.pdf>; and <http://www.jhindslaw.com/wp-content/uploads/2016/06/Reclamation-Claim-Part2.pdf>.
- Assert reclamation rights. Make a timely written reclamation demand on the Debtor for all goods sold in the ordinary course of the seller's business and received by the Debtor within 45-days of the bankruptcy filing date. Review the court docket to determine if the court has entered a universal order governing how reclamation claims are to be determined and paid. If the Debtor retains the goods, consult with counsel regarding the efficiency of filing an adversary proceeding seeking an order enjoining the Debtor from selling the goods to a bona fide purchaser for value.
- Assert § 503(b)(9) claims. Review the court docket to determine if the court has entered procedural orders affecting § 503(b)(9) claims. Any § 503(b)(9) claims should be supported by specific supporting documentation and affidavits. If no procedures have been established in the case consult counsel about filing a motion requesting payment of all § 503(b)(9) claims.

- Perfect all mechanics' lien claims. Under § 546(b)(2), the post-filing perfection of state law mechanics' lien claims is not a violation of the automatic stay. As soon as possible, send a notice to the Debtor and the court that you intend to perfect a state law lien claim. The notice must state clearly that the seller does not consent to any sale of the goods "free and clear" of the seller's lien right claim and that any sale conducted by the Debtor creates cash collateral of the seller under § 363(a) of the Bankruptcy Code.
- Consider serving on the creditors' committee. If you are unfortunate enough to be one of the 20-largest unsecured creditors in the case, consider serving on the official committee of unsecured creditors. If solicited by the Office of the United States Trustee, promptly return the solicitation letter to the U.S. Trustee's office, and make arrangements to attend any organizational meetings called by the U.S. Trustee's office.
- Prosecute any setoff or recoupment rights against the Debtor. Consult with counsel and seek relief from the automatic stay to exercise setoff rights against the Debtor. Retain possession and control of any assets of the Debtor subject to setoff claims as a defense to a turnover action filed by the Debtor. Question the Debtor's request for use of cash collateral to make sure that your setoff rights are not compromised. Resist any action by the Debtor to sell lien-ed assets under § 363 of the Bankruptcy Code unless the Debtor proposes and the court orders adequate protection to you claims. File a Proof of Claim asserting all set off rights to avoid claims that these rights have been waived or overwritten by administrative orders entered during the case.
- Requests that the court set a deadline by which the debtor must assume, assign, or reject the contract with the seller. If the court will not compel the debtor to make a decision, then alternatively: (a) request adequate protection during the interim period, such as payment on a COD basis or other relief; (b) file an administrative claim for the reasonable value of any benefits received by the debtor during the interim period; (c) examine the debtor and compel production relevant documents to determine the debtor's ability to perform the contract; or (d) exercise state law remedies under Section 2-609 of the UCC to demand adequate assurance that the debtor has obtained either secured lender's consent or court authorization to use cash collateral. However, it may be necessary to seek relief from the automatic stay to exercise these rights.
- Request relief from the automatic stay to modify the terms of the contract or exercise termination rights (see above Avoid Violating the Automatic Stay).
- Determine whether the debtor is in default under the contract and whether the seller has waived these defaults. If the debtor assumes the contract and there are un-waived defaults, it must: (a) cure these defaults, including all non-monetary defaults, or provide adequate assurance that the default will be cured promptly; and (b) provide adequate assurance of future performance.

- Monitor the court docket. The only ways to stay on top of matters in bankruptcy court are to request notice from the clerk and/or to actively monitor that court's docket. You must remain vigilant since you may be one of hundreds of creditors seeking a recovery from the Debtor's Estate. Be aware of requests for use of cash collateral, motions for post-petition funding, motions to sell assets free and clear of liens, motions for relief from stay, and plans filed in the case. File appropriate objections of actions taken in the case which affect your claims against the Debtor.
- File a Proof of Claim early in the case and monitor the docket to determine if a Bar Date has been set by the court. Be prepared to file multiple Proofs of Claim to reflect your priority, secured, and unsecured claims. Remain flexible. If the facts change amend your Proofs of Claim. Monitor the court docket to determine if objections are filed to your Proof of Claim.
- Review the Proposed Chapter 11 Plan and Disclosure Statement. Under the Bankruptcy Code a confirmed Plan of Reorganization becomes a new contract between the Debtor and its affected creditors. Make sure that all of your claims are properly classified in the Plan and that the Plan does not treat your rights unfairly. File all appropriate objections to the disclosures made in the Disclosure Statement and be prepared to vote on the Plan when mandated by the Court.

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