



By Cass S. Weil



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DEALING WITH BUSINESSES IN BANKRUPTCY

Often a business finds itself in a situation where one of its customers or tenants has filed for bankruptcy protection. What can the business do to collect existing debt, enforce a lease or contract, or avoid further losses as a result of having dealt with an insolvent business? The Bankruptcy Code addresses these situations, and a lawyer experienced in working with the bankruptcy court can help achieve desired results, including helping to determine, prior to bankruptcy, if there is evidence that the business is in financial trouble.

Dealing with Bankrupt Customers

If your business has sold goods to a customer that later files bankruptcy and you do not receive payment, you can demand the return of goods furnished to the bankrupt buyer within 45 days from the date the goods were received by the buyer. In addition, claims for the value of goods received by the debtor within 20 days of the date of filing of a bankruptcy are afforded "administrative expense" priority. This means that such claims are more likely to be paid in full. Our bankruptcy team can help you obtain the benefits of these provisions of the Bankruptcy Code by assisting you in making a reclamation demand or by filing your claim for payment of "administrative expenses."

Other issues relating to dealing with financially troubled customers with which our bankruptcy team can help include advising you concerning whether and under what circumstances to begin or continue doing business with a supplier or customer that has filed for bankruptcy and collection of delinquent accounts in or out of bankruptcy.

Defending Against Preference Claims

One of the most frustrating aspects of having a customer or supplier file bankruptcy is the demand, usually not received until nearly two years after the bankruptcy is filed, for the return of money paid to you by the bankrupt customer within the 90 days prior to its filing bankruptcy. Such payments can be deemed a "preference." Preference law is designed to facilitate equal treatment of all trade creditors. Often, distressed businesses will pay creditors selectively, especially as they near filing bankruptcy. By recovering payments made within 90 days of bankruptcy and redistributing this money to all creditors, according to the intention expressed in the Bankruptcy Code, the policy of "equal treatment" of all creditors is supposedly advanced. This broad policy objective, of course, means nothing to individual creditors who are being required to return money to a debtor who, in most cases, has already caused a loss. To make matters even more frustrating, the return to creditors upon the redistribution of preference recoveries is usually very small.

However, not every payment made within 90 days of bankruptcy is a "preference" that must be returned. There are numerous defenses to the claim that money received within 90 days of bankruptcy by a creditor must be returned. Because of these defenses, most preference claims that are contested are settled. Our bankruptcy team is experienced in defending against claims for return of preference payments, both large and small. Almost always, our bankruptcy team can obtain a reduction in the amount of money demanded and, sometimes, convince the debtor to abandon its preference claim entirely.

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Enforcing Executory Contracts

When a tenant or a party to a contract under which both parties still have obligations files bankruptcy, the Bankruptcy Code gives the debtor the right to assume or reject the “executory contract” or lease of real property. As with preferences, the debtor’s right is limited in certain ways by the Bankruptcy Code. Executory contracts or unexpired leases give rise to many complex issues. If you have a commercial or residential tenant or other contract party who files bankruptcy, we can help you by explaining the

debtor’s rights and, perhaps more importantly, the debtor’s duties as well as assisting you in fully protecting your interests to the extent allowed by law.

There are many other ways in which our bankruptcy team can assist you in dealing with financially troubled and bankrupt businesses, including helping with the acquisition of assets of such companies. To learn more about our bankruptcy team, please visit our web site at www.moss-barnett.com and feel free to contact any member of our bankruptcy team with questions.