

Maximizing Recovery in Bankruptcies

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Disclaimer: I am not an attorney and I am not practicing law. My comments are based on a couple of decades of experience. When you have a legal question, I encourage you to contact competent legal counsel.

My perspective is that of the unsecured creditor. This session has been built around the process of becoming aware of a filing and taking actions to minimize the loss. The bankruptcy checklist [see last page] generally follows this process, from the most immediate need to those done later.

Generally, the process involves establishing the amount currently at risk (the account balance plus orders in process), placing unshipped orders on hold and stop shipments in transit; using reclamation rights to reduce the amount at risk, and clearly establishing the extent of risk for previous payments on account that might be recalled as preferential. In addition, we determine what happened so that we might avoid similar situations in the future. As appropriate, we consider serving on a Creditor's Committee.

Early Warning & Notification

From Debtor

From Industry Group

From Credit Reporting Agency

Confirmation

APB

Advising those involved in order to cash cycle of filing

Determine if there are any orders that haven't been put in the system.

Placing unshipped orders on hold

Advise management

Stopping shipments in transit

[see Booklet]

Make demand on carrier, warehouseman or other bailee of the goods before the buyer receives possession or control of the goods

If you decide to continue to sell

Reclamation

[see Booklet]

1. UCC: Four requirements – sale on credit, demand within ten days of receipt, buyer must still have possession, buyer insolvent when goods received.
2. Bankruptcy Code: Other four reqmts + sale in ordinary course, written demand

Preference Analysis

[see Booklet]

1. Purpose of preference law: more equitable distribution to creditors.
2. Six required elements: transfer of property of the debtor, to or for the benefit of a creditor, that occurs within 90 days before filing (one year for an insider), because of a preexisting debt, that allows the creditor to receive more than it would have received in a Ch. 7 liquidation, and the debtor was insolvent at the time the transfer was made.
3. Common defenses:
 - Ordinary course – historical transactions and industry practice
 - New value – shipped new merchandise after payment
 - Contemporaneous exchange – COD or other form of cash sale
4. Evaluating Exposure:
 - Review payments and sales within 90 day period; identify payments according to terms (objective) and pattern of payment (subjective)
 - Identify as Contemporaneous any cash sales.
 - Identify as Ordinary Course any payments within terms or within the historical pattern of payment.
 - Identify as New Value any new sales following payments within the preference window.
 - Identify all other payments, less New Value, as subject to possible preference attack by the DIP or a trustee.
5. Demand must be made within 2 years or appointment of trustee.

Post Mortem

- How much do we have at risk from the filing?
- How much did we recover (and when) on reclamation?
- How much exposure do we have to a preference claim?
- What caused the filing?
- Did we miss something in our review ?
- What can we do to reduce the risk of similar problems in the future?

Filing the Proof of Claim

1. In Ch. 7, within 90 days of the first scheduled meeting of creditors
2. In Ch. 11, if you're listed on the debtor's schedules, you do not need to file.
However, often the listing is inaccurate.
3. Contingent, disputed, unliquidated – get in line!
4. "No asset" cases
5. Late proofs of claim
6. Remember to file a new claim if you pay preference.

Increasing the dividend:

Focus on the debtor

Accuracy of schedules: assets, liabilities, secured debt, ownership

Look hard at the secured parties

Look hard at any insiders

Look to other third parties

Serve on the creditors committee

Conclusion: It's possible for a significant amount of money to slip through your hands in bankruptcy losses. By carefully evaluating the situation at the time you file, your rights to stop shipments and to reclaim, by being aware of potential preference exposure, and by learning from mistakes, you can reduce the loss and directly affect the recovery in bankruptcy cases.

SAMPLE
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Bankruptcy Checklist

Customer: _____ **Date:** _____

Acct. No.: _____ **Credit Manager:** _____

1. Notification of BK filing from _____.

2. Confirmation: Ch. ____ BK filing confirmed by _____;
filed _____; case # _____
(date)

3. APB issued _____ and unshipped orders placed on hold pending review.
(date and time)

4. Shipments in transit: Demand issued _____ for \$ _____
(date)

5. If continuing with customer: New account #: _____

Terms of Sale: _____ SLC PG Collateral

6. Reclamation analysis covering period from _____ thru _____
(date) (date)
completed. If appropriate, demand letter issued _____ for \$ _____
(date)

7. Preference analysis covering period from _____ thru _____ completed.
(date) (date)

Potential preference exposure \$ _____.

8. Postmortem completed _____; copies to _____
(date)

9. Proof of claim filed _____ for \$ _____
(date)
