Banking and Finance Law Report

Blog series:

Sales and unsecured credit

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Table of contents

Structuring Sales to Ensure Payment

August 10, 2012 | Polly J. Harris

Know Your Customer
Before entering into a transaction, obtain the following information and documents that will help you determine if this is someone with whom you want to do business, and will help you set the terms under which you want to do business. It will also assist in the event collection of a debt is necessary.

Financial statements, including an income statement, a cash flow statement and a balance sheet.

1. Dun & Bradstreet- this is a subscriber service that rates businesses.
2. Trade references – these are references from other businesses with which your potential customer does business.
3. Bank references- find out where your potential customer banks.

Document Your Agreement
First, it's important to be clear about the financial terms of your agreement. Agree before the transaction how your customer will pay you (cash, credit card, electronic transfer) and agree whether interest will be paid on accounts that are not paid when due. The Ohio Supreme Court ruled unanimously in 2008 that interest on an open account, also called a "book account", is limited to the statutory rate set forth in O.R.C. §1343.03(A) unless a written contract provides a different interest rate. See, *Minster Farmers Cooperative Exchange Company v. Myer* and *Minster Farmers Cooperative Exchange Company v. Dues*, 117 Ohio St.3d 459 (2008). The written contract must be a document that is signed by the customer, because the seller's notation of interest on an invoice or an account statement not signed by the customer does not constitute a "written contract" under R.C. §1343.03(A).

Next, there are a few non-financial terms to be considered. Consider whether you want a security interest, which creates a lien on or claim to the goods you are selling or on other assets of the buyer. If so, you will need a security agreement signed by the customer and a financing statement filed at the secretary of state (or equivalent office) in the state of your customer's incorporation or formation.

Guarantees of payment are a second non-financial term that must be considered as part of the doing business. Guarantees are usually obtained from the customer's owner or owners, who will benefit from your doing business with the customer.

Finally, as part of the non-financial terms, establish a reporting schedule for financial information. The debtor and guarantors should provide you with regular financial information, including signed tax returns and signed financial statements.

Keep in mind, if you are obtaining financial statements make sure they are signed and dated and, if from an individual, determine if the individual has listed jointly- held assets, such as a residence owned with a spouse, and his or her percentage of ownership in jointly-held assets.

Once you have your reporting schedule and agreement in place, there are a few final pieces to consider:

Reserve inspection rights (meaning that you can inspect goods sold to your customer) and safekeeping (meaning that the customer agrees to keep goods safe, secured and insured as appropriate.)

1. Have your buyer consent that, in the event you have to bring suit to collect what is owed, your buyer consents to be sued in your home state. This is also called also called a consent to jurisdiction.
2. Consent to attorney fees- in the event you must bring suit to collect, the customer agrees that they will pay your reasonable attorney fees.

Now that the agreement is in place, be sure to keep proper records regarding your customer, including copies of all instruments by which your customer pays you. It may be relevant later on to have a copy of a check your customer used to pay you in the event you want to garnish their bank account.

Back to top

Signs of Trouble Before Payment Default

August 23, 2012 | Polly J. Harris

With the recent economic slowdown in many sectors and the parade of corrupt corporate executives on the evening news, corporate managers are more sensitive than ever to signs of troubled business practices and how those practices affect outstanding receivables. Many distressed businesses display early warning signs of impending trouble, including some or all of the following:

- **Lack of a sound business plan**- The company may not have a plan or may have expanded past the vision of it original business plan.

- **Ineffective management style**- The management of a small company that has experienced rapid growth may not be able to delegate authority effectively.

- **Poor lender/vendor relationships**- The company may not respond quickly or fully to its vendor's request for financial information or may actively hide information from its vendors.

- **Change in market conditions**- The market for the company's product may have changed, leaving the company with a shrinking market share and lower sales. The company's technology or marketing may be obsolete to compete in the current marketplace (remember 8-track tapes?).

- **Over-diversification of products**- The company may enter non-traditional markets too quickly in an effort to increase flagging sales but without the necessary resources or knowledge to compete successfully in the new market.

- **Geographic expansion**- The company expands its footprint too quickly, straining managerial and financial resources. These signs should alert the vendor that the company may be a candidate for default on existing obligations. The prudent vendor should heed these signs and take immediate action to protect its interests in the event the company defaults on its obligations or seeks protection from its creditors under the Bankruptcy Code. Consider shortening payment terms, going to credit card payment or cash on delivery, a consignment sale format or taking a security interest in the customer's assets of obtaining a guaranty from a financially reliable insider.

Back to top

Default by a Customer: Knowledge is Power

August 31, 2012 | Polly J. Harris

By understanding your position prior to or shortly after a default by the customer, it may be possible to negotiate favorable terms with the customer to avoid default, proceed with litigation against the customer before there is a deluge or prepare for a bankruptcy by the customer. To identify your options and rights as a vendor you must first determine the following:

1. Default provisions;
2. Default notice requirements;
3. Permitted interest, late charges and attorney fees;
4. The existence of guaranties (corporate or individual);
5. Existing or potential collateral and available equity; and
6. Where you would need to sue, i.e., jurisdiction.

Access Public Information

Much of the information you need to obtain on your customer is available as public information.

Ohio and other states offer a wealth of free on-line information, including the following:

1. UCC filings with the Ohio Secretary of State's Office. Has your customer granted someone a security interest in all of their assets?
2. Lien information is available at most County Recorder's offices (this covers consensual liens such a mortgages, and non-consensual liens like mechanic's liens and tax liens).
3. More formal certified tax and lien searches are available through title companies for a fee.
4. You can search many court dockets for free and determine if your customer is being sued, particularly for non-payment.

Workout Options

Vendors generally prefer restructuring a distressed credit to having the customer seek protection from its creditors under the Bankruptcy Code, especially if the receivable is unsecured or undersecured. Vendors prefer the predictability of restructuring a distressed credit to participating in the protracted and arcane world of bankruptcy proceedings. In contrast, if the vendor and customer cannot restructure an existing receivable, the parties may face many months (or years) of litigation or bankruptcy proceedings.

Before agreeing to restructure a customer's existing obligation, a vendor must be satisfied that the customer will be able to meet the terms of the rewritten agreement. Among the items a vendor should consider before approving any workout are the following:

1. The customer's ability to apply adequate resources toward repayment of restructured credit;
2. The customer's ability to provide collateral;
3. Obtaining guaranties or additional guaranties; and

4. The competence and trustworthiness of customer's management team.

The key to a successful workout is good communication. The customers' management should expect to provide immediate answers to the vendor's questions and should make itself available to meet or speak with the vendor at the vendor's request. Management's goal is to convince the vendor that the workout is necessary, prudent and will succeed by permitting the customer breathing room to reestablish its fiscal health.

If the customer hopes to successfully restructure its existing obligations, its management should expect increased scrutiny from the vendor. Management should expect the vendor to actively review the company's financial position, its sales or production figures, its aged receivables and its obligations and liens extended to other lenders or suppliers. The vendor, or its agents, may conduct site visits, talk to the company's vendors, inspect its audited financial statements and interview key management.

Accounting and Financial Reporting

A vendor considering a restructure should obtain copies of the customer's financial statements, preferable audited statements, and should require copies of future accounting and financial reports at regular intervals, whether monthly, quarterly or semi-annually. These intervals should be included in the terms of the restructuring. By reviewing these reports, the vendor can monitor the customer's fiscal health and can determine if the customer is meeting any benchmarks established by the terms of the restructure agreement. If the vendor senses the company is not performing as anticipated after the restructuring, the vendor needs to be able to quantify its concerns and inform management of the non-performance.

Termination of Negotiations

If you have reached an impasse, if further negotiation appears fruitless or if you or your customer lack authority to continue, set a time limit for further negotiations. Do not let yourself be strung along by a customer who is promising to reach a settlement, but is in the mean time secreting or transferring assets.

In contrast, if you have reached a settlement, immediately send a confirming email or letter stating the full amount of the claim, the settlement amount, the date by which it will be paid, and any other terms. Request that your customer contact you immediately if it does not agree. Follow up promptly with documentation, including:

1. A note representing the old balance. Converting an aged receivable to a promissory note may also benefit you as vendor, to the extent the aged receivable could not count toward your borrowing base with your lender;
2. Admission of balance/ waiver of defenses;
3. Interest;
4. Warrant of attorney- this is language in a note that permits a lender/ vendor to take judgment against a borrower without notice, and is a very powerful tool. Warrants of attorney are permitted in Ohio and a few other states, are limited to commercial (not consumer) transactions, and must be used in strict compliance with the applicable statutes; and

5. A security agreement, mortgage or guaranty.

In this economy, many providers of goods and services are finding that their customers are stretching payments, thereby making the vendor an involuntary bank, providing a kind of line of credit. Don't be the bank. In the event of a customer default, assess your rights, communicate promptly and determine if a restructure is possible. If your customer is not responsive to your reasonable requests for information, is not honest or does not have the ability or willingness to repay even a restructured obligation, it may be time to go to court. Tune in to next week's blog for a discussion on use of litigation to recover your receivables.

Back to top

What to Consider When Non-Payment Leads to Litigation

September 6, 2012 | Polly J. Harris

The previous article in this series, Default by a Customer: Knowledge is Power, outlined how to negotiate favorable terms with the customer to avoid default, proceed with litigation against the customer before there is a deluge, and prepare for a bankruptcy by the customer. This article will cover key considerations as you head toward litigation with a customer in default.

Determine Your Weaknesses

- Determine if you as vendor or service provider are subject to any counterclaims if you sue your customer for nonpayment. Might the customer assert that the goods sold or services provided were faulty, not in accordance with contract, or otherwise unacceptable? Your customer will have a difficult time proving its counterclaim if it has retained the goods you sold without complaint, has incorporated them into their product or resold them.
- Verify that your documents and the accounting of the balance that you claim is due from your customer are in order.

Determine Your Time Constraints.

- What are your deadlines? Are you subject to any time constraints that will affect your decision making, such as the desire to get income from the settlement into the current fiscal quarter or bank reporting deadlines?
- Determine the applicable statute of limitations for bringing suit. Note that in Ohio, effective September 28, 2012, the statute of limitations for suit on a written contract was recently reduced from 15 years to 8 years.

File Suit

- Determine whether your written agreements with your customer require that you provide the customer with written notice of the default, including the delivery method, such as certified mail or hand delivery, and determine whether you must give your customer a specified amount of time after you notify the customer of its default in order to pay you, also known as "curing" the default.
- Determine where to file suit, also known as determining the jurisdiction. As recommended in a prior blog post in this series (see Structuring Sales to Ensure Payment), your written agreement with your customer should contain the customer's agreement that if a suit is necessary, the customer consents to be sued in your home state and agrees to pay your attorney fees. These consents to jurisdiction and to pay legal fees are powerful agreements. A non-paying customer will think twice about forcing a collection lawsuit if it has consented to

jurisdiction in the vendor's home state and county and to pay the vendor's attorney fees.

- If the customer does not answer the complaint within the time established by your jurisdiction, seek judgment by default. The exact procedure will vary by jurisdiction, but generally involves filing a motion with the court with an affidavit stating the balance due. If the customer does file an answer to your complaint, it still might be possible to avoid a trial in court by using a procedure called summary judgment, which it does by written motion. It is rare for collection suits to go to trial where no real defenses are presented as to payment or the quality of the product or service sold.

Conclusion

You never want to file suit- it's not your core business. However, if your customer is not paying and not responding to your demands for payment or your offers to restructure their balance due, assess your options, analyze any defenses that your customer could assert to a payment demand and determine your obligation to give notice. In order to make litigation as convenient as possible, have your customer agree at the onset of your relationship that litigation will be in your jurisdiction, and that the customer will pay your legal fees.

Back to top

Post-Judgment Remedies

September 21, 2012 | Polly Harris

You have obtained money judgment against your debtor, thus turning you into a "judgment creditor" and them into a "judgment debtor", and now it's time to convert that important piece of paper called a "certificate of judgment" into cash or something that can be reduced to cash. First, determine what assets are available to pay your judgment, then determine how to access them.

Analyze the Debtor's Assets

There are a number of sources of information about your judgment debtor's assets and financial situation, including the following:

- Examine financial statements that the judgment debtor provided during the course of your business relationship to identify available assets.
- If you subscribe to Dun and Bradstreet, obtain a Dun and Bradstreet report.
- Determine whether there are any legal actions pending against the judgment debtor, which may mean you will be in a race to recover assets, or whether the judgment debtor is suing someone, which may provide you a source of recovery. Most court clerks' records are available on line and are searchable by name. If you are concerned that your judgment debtor has filed for bankruptcy protection, contact the Bankruptcy Court clerk for the district where your business judgment debtor was incorporated or formed or has its principal place of business.
- If the debtor is a corporation it may be possible to pierce the corporate veil and recover against assets of stockholders.
- Determine if there has been a preferential transfer or a fraudulent transfer in violation of the governing state's law.
- Once you are a judgment creditor, you may also ask the court that issued your judgment to schedule a judgment debtor examination of the judgment debtor or a third party. This is an examination under oath with a court reporter at which a judgment creditor may ask the judgment creditor questions about their assets, liabilities, cash flow and expenses.
- Keep your ear to the ground. Competitors, clients, customers, neighboring businesses and co-defendants of the judgment debtor may be sources of information regarding who the debtor does business with, what accounts receivable are available or whether the judgment debtor is still in business or has formed a new business.
- Locate bank accounts. First, if you have a financial statement, it should provide bank account information. You should also keep copies of the checks your judgment debtor used to pay you during the course of the relationship in the event you later need to garnish that account. There are also companies that specialize in locating debtor bank account information for a fee. Check applicable laws before engaging

such a company. If you know where your judgment debtor banks and have an account number, call the bank, inquire about the balance of account, then proceed with non-wage garnishment as discussed below.

- If your judgment debtor has assets that are in your state, but in a county other than the county that issued your judgment, you can file your judgment in that other county for a nominal fee. This will facilitate your recovery of assets in that other county.
- If your judgment debtor has assets in a state other the state where you obtained judgment, retain an attorney in that state to domesticate your judgment under the Uniform Enforcement of Foreign Judgments Act, which will permit you to pursue the judgment debtor's out-of-state assets.

Foreclose on Property

A judgment creditor may foreclose on real property or on personal property. Such actions are conducted through the appropriate court and county sheriff, and a judgment creditor will first have to verify whether other creditors, whether by virtue of secured loans or judgments, will have a prior claim to the property and whether after such prior claim there will be any value left for the judgment creditor.

Obtain the Appointment of a Receiver

Although you usually see the appointment of a receiver pursuant to a mortgage of rental property, a receiver can be very valuable if the debtor engages in the business of selling products to companies on account and refuses to turn over the proceeds of the collection of its receivables to a creditor holding a security interest therein or to a judgment creditor.

Most states permit the appointment of a receiver in a number of circumstances, including the following:

- in an action by a vendor to vacate a fraudulent purchase of property;
- In an action by a creditor to subject property or a fund to its claim;
- In an action by a party whose right to or interest in the property or fund, or the proceeds of the fund, is probable, and when it is shown that the property or fund is in danger of being lost, removed, or materially injured;
- In an action by the holder of a mortgage, for the foreclosure of the mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt;
- After judgment, to carry the judgment into effect;
- A corporation has been dissolved, is insolvent, in imminent danger of insolvency, or has forfeited its corporate rights; or
- After judgment, to dispose of property, to preserve property pending appeal, or when an execution is returned unsatisfied and the debtor refuses to apply property to satisfy the judgment.

Although the powers of a receiver will vary by the state, a receiver can generally bring and defend actions, take and keep possession of property, receive rents, collect and compromise demands, make transfers, and do such acts respecting the property as the court authorizes.

Garnishment – A garnishment is a legal proceeding in which a creditor attempts to obtain payment of a debt out of property of the debtor in the hands of a third person. The most common example is a bank account, which is why creditors are advised to keep copies of the checks that your debtor used to pay you during the course of the relationship.

Injunctive Relief – There are certain situations in which injunctive relief is available from a court to assist a creditor in a collection action. Under Ohio Civil Rule 65(A) and analogous civil rules in other states, a temporary restraining order may be granted without written or oral notice to the judgment debtor or its attorney only if it clearly appears that the party requesting such relief will suffer immediate and irreparable injury, loss or damage, which is typically defined as an injury which is not capable of being remedied by money damages.

There are a number of avenues a judgment creditor may take to collect a judgment, but the best way to be prepared to collect a judgment is to compile and retain information about your customer's financial situation and its banking relationships during the course of your dealings with them. In the unfortunate event you go from being a vendor or a service provider to being a judgment creditor, you will be armed with information about what assets are available to satisfy your judgment, and will then be able to determine how to collect them in the most cost-efficient manner possible.

Back to top

Bankruptcy

October 11, 2012 | Polly Harris

This posting will provide a general overview of bankruptcy law for the non-lawyer, including what it means to be "bankrupt," the types of bankruptcy, and bankruptcy issues for creditors, particularly for sellers of goods or services.

Bankruptcy Structure
Bankruptcy Code is federal law- it was created by, and is amended by the U.S. Congress. In theory, the same laws and rules apply wherever you file bankruptcy in this country, however it does happen that different Bankruptcy Courts around the country interpret the same statute differently. When this happens, the cases are appealed. If the U. S. Courts of Appeals reach different conclusions about the same statute, it is possible that the U.S. Supreme Court will resolve the controversy.

Bankruptcy judges are appointed to 14-year terms. This differs from other federal judges, like District Court, Court of Appeals, and U.S. Supreme Court judges, who are appointed for life.

Because Bankruptcy Courts are federal, Bankruptcy Courts generally only sit in the large cites in a state- they are not in every county seat or town, like county courts and municipal courts.

The Bankruptcy Courts require electronic filing and have their case filings imaged online, so anyone with an account can go into a specific court's website and find out what pleadings have been filed in a case and read the pleadings on line or print what has been filed.

What Does It Mean to be "Bankrupt?"
A person or business is bankrupt if it has either a balance sheet insolvency, meaning that the debtor's debts exceed its assets, or cash flow insolvency, meaning that the debtor cannot pay its debts as they become due, although both types of insolvency are often present in a case. The notion of whether one is "bankrupt" for purposes of eligibility to file for bankruptcy protection comes up when it appears that a debtor has filed bankruptcy in order to escape one debt. This can occur when commercial real estate is in foreclosure and it is the only asset of the business.

Initiation of a Bankruptcy
Bankruptcy begins with filing a petition in the Bankruptcy Court. A bankruptcy filing may be voluntary, where the debtor initiates the petition, or involuntary, where one or more of the debtor's creditors petition the court to put the debtor into bankruptcy.

Universal Bankruptcy Concepts
There are some concepts that apply to all types of bankruptcies, whether they are reorganizations or liquidations:

- *Automatic Stay*: upon the filing of any type of bankruptcy, something called the "automatic stay" is imposed. This means that creditors cannot continue litigation or collection action against someone who has filed bankruptcy. The automatic stay does not operate to halt criminal action or paternity or support obligations. What sometimes happens is that litigation that is pending when a bankruptcy is filed will be moved to the Bankruptcy Court.

- *Proof of Claim*: A creditor makes its claim in bankruptcy by filing what is called a "proof of claim" that sets forth the amounts the creditor is owed, the basis for the claim (goods sold, etc.) and provides supporting documentation. A creditor knows if the debtor does not agree with the claim if the debtor files what is called an objection or lists the claim as "disputed" in its schedule of debts. If the debtor and creditor cannot resolve a dispute about the creditor's claim, the Bankruptcy Court will determine the validity and/ or amount of the claim.

- *Priorities*: The Bankruptcy Code sets what are called priorities- that is, who gets paid first. Under the Bankruptcy Code, the priorities are generally as follows: the administrative expenses, meaning the expenses of the case itself (including professional fees, costs of running a business, taxes, environmental remediation); wage claims, unpaid contributions to employee benefit claims and unsecured claims. Shareholders are generally paid last in corporate bankruptcies. Secured creditors will be repaid the value of the collateral securing their lien, so if a bank has a $500,000 mortgage loan on property that the Bankruptcy Court finds is worth only $200,000, the creditor will only be repaid $200,000 and the remaining $300,000 will be paid as an unsecured claim, and receives a percentage distribution.

- *Nondischargeable Obligations*: Certain types of debts cannot be eliminated in bankruptcy: money or property obtained by false representations about one's financial condition; debts that are not listed in the bankruptcy schedules; court-ordered alimony or child support; debts arising from willful or malicious injury or from driving while under the influence; and, except under very rare circumstances, government guaranteed student loans.

Types Of Bankruptcies

There are several names given to the various types of bankruptcies: they are generally called by both the numbers used in the law, and by the actual subject matter dealt with. The chapters that are used the most frequently are Chapter 7 (liquidation), Chapter 11 (reorganization) and Chapter 13 (personal reorganization). First, however, a brief description of the other chapters.

- Chapter 9 – Municipalities. Bankruptcy filing by municipalities, particularly in California, are on the rise; most cities cite union and legacy costs as the cause. It makes sense that there are provisions for dealing with a city's financial crisis, because of the impact on the provision of city services, including police and fire.

- Chapter 12 – this is for family farmers, not corporate farmers, and in order to be eligible to file a Chapter 12 bankruptcy, a family farmer must derive at least 50% of their income from farming.

- Chapter 13 – this is personal, or opposed to corporate, reorganization. Many of the same concepts apply as in the corporate reorganization, and a Chapter 13 reorganization can be used to shed unsecured (generally credit card) debt.

Turning to the more frequently used chapters:

- Chapter 11: this is a reorganization, and is used by businesses to restructure debt and continue in business. A business can shed leased locations, cancel contracts, restructure debt to more favorable interest rates or amortization periods, and pay pennies on the dollar on trade or unsecured debt. A company can file bankruptcy in the state where it is incorporated or where is conducts most of its business. This has resulted in a great number of filings in the Bankruptcy Courts in Delaware and New York, because many businesses incorporate in those states. Legislation has been discussed to require businesses to file for bankruptcy where they conduct business, instead of where they are incorporated or happen to have a single office, which this will make participation by creditors, including former employees, easier.

  - *Plan of Reorganization* - Chapter 11 (and Chapter 13) cases are supposed to conclude with what is called a "plan of reorganization" that sets forth how the debtor intends to restructure and pay its debts. Creditors get to vote on and object to the plan, and the Bankruptcy judge has the ultimate authority to approve or deny the plan. Of those plans that fail to obtain approval, most fail because they are deemed not "feasible" which means that the income projections are too optimistic and the expense projections are too low. In addition, the debtor must propose in its plan to treat creditors with the same types of claims equally. The best example of this is trade creditors, who are generally unsecured. It would not be permissible for one trade creditor to be paid 80 cents on the dollar and another to be paid 10 cents on the dollar.

  - *Reorganization to Liquidation*- Chapter 11 cases and Chapter 13 reorganizations can turn into Chapter 7 liquidations. This can happed either voluntarily upon the debtor's request or involuntarily, either by the request of a creditor or by the Bankruptcy Court's order. This can happen if it doesn't appear that reorganization, which requires a certain level of income and expense, is feasible.

- *Chapter 7*, so named because it's the 700 series of the Bankruptcy Code, is liquidation. Individuals and companies can file for Chapter 7 bankruptcy. For an individual, most assets will be sold or returned to the creditor. An asset might be returned to the creditor that has the first lien on it if there is no equity in the asset, for example if real estate is worth $500,000 but the mortgage on it is $750,000. In contrast, a debtor may chose to affirm certain debts if they want to retain the corresponding asset. For a business, Chapter 7 liquidation means the business is closed or will be closed, and will be sold off in whole or in parts. A trustee is appointed by the court to oversee the sale of the debtor's assets (note that the debtor is not in charge, as in an 11); it's also possible that the effect of a Chapter 7 for an individual (not a business) is a discharge from their debts. If an unsecured creditor receives a 10% distribution through a Chapter 7, the remaining 90% is discharged, meaning that the creditor cannot come back after bankruptcy and try to collect the 90% balance from the debtor. That creditor may face a contempt of court charge. There are specific sections in Chapter 7 for stockbroker, commodity broker and clearing bank liquidations.

Bankruptcy Issues For Vendors

The Bankruptcy Code creates certain obstacles for creditors. The filing of a bankruptcy petition creates a bankruptcy estate that is comprised of all the debtor's property. A trustee will be appointed in a Chapter 7 case; a Chapter 11 case may be run by a court-appointed trustee or by the debtor, which will be called a "debtor in possession" or "DIP." The Bankruptcy Code gives broad powers to the DIP, or the trustee as the case may be, to carry out his or her duties. Among the powers of the trustee or a DIP that may affect a lender or creditor are the following:

- *Preferences* are transfers and payments made by or on behalf of the debtors within ninety days before the debtor filed its bankruptcy petition. Transactions made in the ordinary course of business generally cannot be avoided as preferential. There are defenses, including that the debt was incurred in the ordinary course of business and the payment was made in the ordinary course of business; the sale was a substantially contemporaneous exchange (i.e.- COD) or the transaction represented new value- money or money's worth in goods, services or new credit

- Superior Lien Creditor. The trustee or DIP has the power of a superior lien creditor and may set *aside* unperfected interests in real estate and personal property of the debtor. 11 U.S.C. §544. This arises, for example, if a creditor fails to record its mortgage or file its financing statement.

- Post-petition transfers. The trustee may avoid certain transfers made after bankruptcy, subject to certain exceptions including most purchases by a good faith purchaser without knowledge of the bankruptcy. 11 U.S.C.§549(a).

- Fraudulent Transfers. The trustee can avoid fraudulent transfers of real and personal property, subject to Title 11 U.S.C.§548 and applicable state law. A creditor may urge the trustee to pursue transfers it believes are fraudulent.

- Executory Contracts- a contract is executory if some performance, other than the payment of money, is due from both sides.

  i. First, a debtor (or a bankruptcy trustee) gets to decide whether to perform its obligations under an executory contract. In bankruptcy parlance, a debtor who "assumes" a contract agrees to perform it; a debtor who "rejects" the contract has decides not to perform, and to breach it.

ii. Second, while the debtor is deciding what to do, the non-debtor party to an executory contract has to continue performing as if no bankruptcy had been filed. Your option is to ask the court to make the debtor decide what it's going to do, aka, "compel."

iii. Third, if the debtor assumes the executory contract – here's the good news -- the debtor has to pay ("cure") in full any payment or other defaults and show that it can actually perform in the future. If the debtor wants to assume and assign the executory contract to someone else, commonly a buyer of its assets, at a minimum the debtor has to cure any defaults and the buyer has to show that it can actually perform under the contract in the future.

iv. Personal services contract are not generally assignable, but they are assumable.

A bankruptcy filing by a business partner, whether a customer, tenants or supplier, can have a significant impact on your business. In the event you receive notice of a bankruptcy filing, notify your counsel, or obtain counsel in order to receive complete and accurate information and to be fully advised of your rights and your risks.

Back to top