

DIMENSIONS

TOP FIVE (5) BANKRUPTCY ISSUES FOR CREDITORS - PROTECT YOUR RIGHT TO GET PAID

By Thomas S. Onder, Esq.

As the economy continues to improve, some businesses are filing for bankruptcy to unsaddle debts. Creditors in the building industry must be vigilant and proactive when a bankruptcy filing occurs. Following are five (5) bankruptcy issues to ensure your best possible right to payment.

Getting Paid for Work Prior to Bankruptcy Filing.

Bankruptcy Code § 502 allows creditors to assert pre-petition claims to ensure their right to payment. Additionally, the Bankruptcy Court requires that creditors provide appropriate proof of the debt. This means attaching copies of contracts, accountings or other materials that prove amounts owed. Further, it's important to use the Bankruptcy Court's Proof of Claim Form 10B. However, knowing how, when and where to file your claim is key.

Getting Paid for Work After the Bankruptcy Filing.

Some creditors will continue to supply goods and services after the bankruptcy filing. Bankruptcy Code § 503 (b) provides these creditors are entitled to priority payment as an administrative claim ahead of other creditors. The reason for this is that post-petition creditors offer vital services to keep debtor's operations going, which benefits the bankruptcy estate. Like the pre-petition claim, it is very important to complete and file the claim right. Sometimes, creditors may need to file a motion to get their claim paid.

Getting Paid for Certain Goods Supplied.

Certain creditors, who supply goods, have the right to reclaim

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those shipped goods. A creditor may attempt reclamation of their goods sold in the ordinary course under Bankruptcy Code § 546(c). But, suppliers must move quickly. Creditors must make a written demand no later than 45 days after delivery. If the 45-day period has not expired as of bankruptcy filing, then suppliers will be provided an additional 20 days to demand reclamation of the goods sold. Sometimes creditors can negotiate that debtors provide priority payment, in lieu of return of the goods.

How the Debtor's Plan Treats Your Right to Payment.

When debtors file for bankruptcy protection, they are seeking to either liquidate all assets or reorganize. If debtor's try to reorganize, then they will file a bankruptcy plan. If approved by creditors, the confirmed plan will allow them to pay creditors, dispose of assets and also sometimes acquire assets. As a creditor, it is essential that you know how your claim is being treated in a plan. Debtors will often try to avoid paying certain creditors. If you do not object to the plan, then your rights may be compromised. Failure to have your voice heard could be costly.

When the Bankruptcy Estate Demands Return of Payments.

Debtors-in-possession and bankruptcy

trustees have authority under Bankruptcy Code § 547 to make a "preference" demand. A "preference" is a payment received from a debtor within 90 days of the filing. It does not matter whether you provided quality work or services. Bankruptcy Code § 547(b) allows avoidance of these payments, if the transfer was to or for the benefit of a creditor on account of an antecedent debt, while the debtor was insolvent.

However, before you cut a check to satisfy the preference demand, it is advisable to seek legal counsel to ascertain if you possess defenses, including:

- 1) Payments made within the "ordinary course of business;"
- 2) "New value" provided for the debt;
- 3) Payments made outside of the 90-day preference period;
- 4) Settlements during the bankruptcy case; and/or,
- 5) Payments made via C.O.D.

To determine if you possess any defenses, it is critical to analyze the full payment history **at least a year before** the bankruptcy filing. This information includes:

- 1) All correspondence, contracts, emails with debtor;
- 2) Copies of all invoices, showing invoice date, terms, and amount;
- 3) Copy of payments received (i.e. checks, wires, cash deposit slip) and date posted;
- 4) Number of days elapsed between date of invoice and date payment received; and,

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About the Author

Thomas S. Onder, Esq. is a Shareholder and member of the Commercial, Retail and Industrial Real Estate, Litigation and Bankruptcy & Creditor's Rights Groups of [Stark & Stark](#). Mr. Onder is a member of the International Council of Shopping Centers and concentrates his practice in the area of commercial litigation, specializing in commercial landlord disputes and secured transactions before state and federal courts in New York and New Jersey, as well as the Federal Claims Court in Washington D.C. He can be reached at 609.219.7458 or tonder@stark-stark.com

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5) Personnel involved with debtor's account, so they can advise how payments were made, applied and any unique issues with debtor.

These are just some of the issues that are essential to properly address and analyze as a creditor in the building industry. A well-thought out response to these issues with sound counsel can ensure your right to payment is preserved in a bankruptcy filing

For more information on defending a preference action, or bankruptcy issues, please feel free to contact Tom Onder, member of Stark & Stark's Bankruptcy & Creditor's Rights Group, at (609) 219-7458 or via email a tonder@Stark-Stark.com.