

BANKRUPTCY 101: A TRADE CREDITORS' GUIDE TO A CUSTOMER'S FILING

Presentation for:

NACM Connect
Worcester Regional Meeting
AC Hotel, Worcester, MA

March 14, 2026

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INTRODUCTION: ONCE UPON A BANKRUPTCY FILING . . .

| PURPOSE OF BANKRUPTCY

- Stay of creditor actions
 - Termination of an agreement or unprofitable leases
 - Setoff
 - Foreclosure
 - Commence/continue lawsuits
 - Enter/enforce judgment
 - Take collateralized property under the UCC
 - Take back creditor's own property
- Fresh start
 - Individual Debtor discharged of most indebtedness
- Equitable distribution of debtor's assets according to claims priority / absolute priority rule



CHAPTER 11: KEY PLAYERS

Debtor

- The entity “in bankruptcy” by filing chapter 11 petition
- A debtor maintains control of its business and assets while in bankruptcy, subject to statutory restrictions

United States Trustee

- Unit of the United States Department of Justice
- Independent overseer of bankruptcy cases

Creditors’ Committee

- Appointed by the United States Trustee shortly after a chapter 11 filing
- Usually 5-7 of the debtor’s largest unsecured creditors (e.g., goods and services providers, unsecured bondholders, litigation claimants, unions, the PBGC, etc.)
- Statutory fiduciary for all of the debtor’s unsecured creditors; serves as a “check” against the process
- Retains its own professionals that are compensated by the estate

DIP Lender

- Lender providing post-petition financing to the debtor (if any)
- Typically protected by very broad liens and claims covering all or substantially all assets

Other Potential Parties

- Other Secured Creditors (prepetition lender), Taxing Authorities, Trade and Other Unsecured Creditors, the PBGC, Landlords, Asset Purchasers, etc.

BANKRUPTCY CHECKLIST – WHAT SHOULD CREDITORS BE DOING WHEN THEY HEAR THEIR CUSTOMER FILED BANKRUPTCY?

- File preservation/Info gathering
 - Preserve credit and other files – paper/electronic, including emails
 - Preserve telephone logs, recorded phone calls, if any, and cell phone texts/instant messages
 - Information gathering regarding proof of claim
 - Invoices, bills of lading and delivery receipts for goods received by Debtor in the ordinary course of business within 20 days of a bankruptcy filing in support of section 503(b)(9), “20 day goods” priority claim
 - Common carriers only keep records for a maximum period of nine (9) months so obtain these records immediately upon learning of a bankruptcy filing



BANKRUPTCY CHECKLIST – WHAT SHOULD CREDITORS BE DOING WHEN THEY HEAR THEIR CUSTOMER FILED BANKRUPTCY?

- File preservation/Info gathering (*cont'd*)
 - Information gathering concerning preference exposure and defenses
 - Payments received within 90 days of bankruptcy filing
 - Analysis of preference defenses
 - Invoices/proof of delivery or bills of lading for new value defense
 - Pay history for subjective ordinary course of business defense
 - At least two years of data before the 90-day preference period should be maintained
 - Credit group data for objective ordinary course of business defense
 - If a critical vendor, documents supporting the payment of prepetition claim

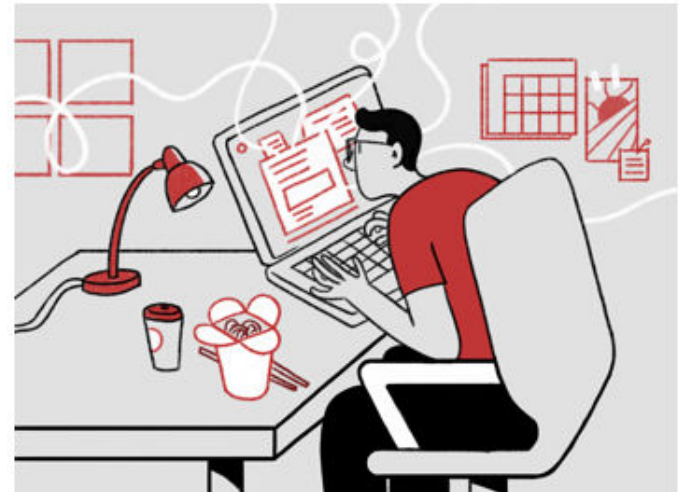
OBTAINING BANKRUPTCY COURT FILINGS

- Download documents filed with the bankruptcy court from court's website generally via PACER Electronic Case Filing (ECF) online service
 - www.pacer.gov
 - Must sign up, create an account and pay (currently \$.10 per page)
- If claims agent has been retained (common in middle market and larger cases), agent's website usually contains free access to court filings/dockets and claims register
- In-house or outside counsel can file notice of appearance with the court and request receipt of all notices in the case
- You can always ask Lowenstein Sandler!
 - We have access to many sources of information



| WHILE THE CASE IS UNDERWAY

- Creditors may receive little notice of events between the commencement of a case and the debtor's attempt to exit bankruptcy through a chapter 11 plan or other means
- Any notice received during this period is likely to have a **direct and material effect on creditors' rights** and should be reviewed expeditiously, but carefully
- Despite the lack of notice, events during this time will have a significant impact on the eventual return to creditors (if any), including through the sale of substantially all of the debtor's assets to a third party or an affiliate of existing, pre- or post-petition lenders
 - Accordingly, creditors who want to track the important developments in a case should file a notice of appearance or diligently monitor the case docket
 - Alternatively, creditors may be able to register to receive notice through the website of the claims agent (if any)



| SECTION 503(B)(9) CLAIMS



WHAT IS A 503(B)(9) CLAIM?

THE “20-DAY” GOODS ADMINISTRATIVE CLAIM

- Section 503(b)(9) of the Bankruptcy Code provides creditors with an administrative expense priority claim for the value of goods sold to and **actually received by the debtor within the 20 days before the bankruptcy filing**
- Safety net for trade creditors that supply goods
 - ***Does not apply to services!***
- Goods must have been sold to the debtor in the ordinary course of the debtor’s business
- Replaces reclamation – a defunct/toothless trade creditor remedy
 - Subject to, and usually rendered valueless, by a secured lender’s floating lien on the debtor’s inventory
 - Limited to goods *in debtor’s possession* on filing date
 - Remedy limited to return of goods – no administrative claim, etc.

THE 503(B)(9) CLAIM: TIMING FOR ASSERTING AND OBTAINING PAYMENT OF CLAIM & MEANING OF “RECEIPT”

- General Rule – Requests for allowance of 503(b)(9) claims require notice and a hearing
 - *There is no automatic 503(b)(9) administrative claim without court approval*
- There is also no federal Bankruptcy Rule specifying the manner in which to assert 503(b)(9) priority claims
 - Many courts prescribe manner of assertion
- There is no deadline to assert a 503(b)(9) claim in the Bankruptcy Code but check applicable local bankruptcy rules – they may contain a deadline!
- The deadline for asserting a 503(b)(9) claim and the form in which it should be asserted may be established by a bar date order entered following a motion by the debtor or other estate fiduciary
- Timing of payment – most courts have rejected immediate payment where the debtor objects
 - Instead, payment is generally made upon confirmation of a plan or earlier if a motion to pay 503(b)(9) claims has been granted
 - Claim may be paid pursuant to critical vendor order . . .
- Frequently litigated issue: what constitutes “receipt”?

CRITICAL VENDOR TREATMENT



| CRITICAL VENDOR PROGRAMS

- ***There is no Bankruptcy Code Provision That Expressly Authorizes Critical Vendor Status***
- It is court-created based on doctrine of necessity
 - Severely limited by 7th Circuit Court of Appeals decision in *Kmart Corporation*, but doctrine still alive in most jurisdictions
 - Reason why there are few cases filed in the 7th Circuit
- Critical vendor status contingent on court approval authorizing (not directing) debtor's payment of prepetition claims of creditors deemed critical or "essential" to debtor's ongoing business/successful reorganization
 - Exception to claims priority rules
 - Only Debtor designates critical vendors
 - Frequently focused on 503(b)(9) claims, lien rights, and foreign vendors – particularly whether claim theoretically must be paid in full to confirm a plan in any event

| CRITICAL VENDOR PROGRAMS

- Standard for debtor determining critical vendors
 - Debtor has broad discretion
 - Courts have the final say
 - Courts have reached varying decisions as to when a vendor is “critical”
 - Some courts prohibit preferred critical vendor status
 - Among those courts allowing critical vendor status, some are stricter than others
 - Vendor less likely to be deemed critical if it is obligated to continue selling to Debtor via pending supply contract

| CRITICAL VENDOR PROGRAMS

- No assurance of 100% payment of critical vendor's claim – subject to negotiation
- Quid pro quo: Generally, creditors receiving such payments must agree to extend post-petition credit (entitled to administrative priority status) and other terms, which generally must be consistent with “best” terms previously provided
- Critical vendor agreement should be reviewed by counsel
 - Negotiate payment and other terms
 - Be careful of fine print that prevents any change in prices and other non-credit related terms
 - Risk of disgorgement of critical vendor payments if creditor stops extending credit
 - Negotiate default provision that gives critical vendor an out based on a current post-petition delinquency of the debtor

CRITICAL VENDOR AGREEMENT

- An actual form critical vendor agreement proposed by Debtor and approved in major chapter 11 case (creditors beware!):

Is the correct order referenced?

What are "Customary Terms"?

Are the correct entities signing?
– Is there a supply agreement?

Consider stipulating to amount and allowance of general unsecured claim and 503(b)(9) claim

When is payment due?

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Sample Trade Agreement

Under the *Interim Order (I) Authorizing the Debtors to Pay Pre-petition Claims of (a) Lien Claimants, (b) Import Claimant, (c) 503(B)(9) Claimants, (d) Foreign Vendors, and (e) Critical Vendors, (II) Confirming Administrative Expense Priority of Outstanding Orders, and (III) Granting Related Relief* [Docket No. ____] (the "Interim Order"), as a condition to receiving any payment under the Interim Order, a payee must maintain or apply, as applicable, trade terms during the pendency of these chapter 11 cases that are at least as favorable as ordinary course trade terms existing prior to the Petition Date or otherwise satisfactory to the Debtors ("Customary Terms"). If a payee, after receiving a payment under the Interim Order, ceases to provide Customary Terms or refuses to supply the captioned debtors in the Interim Order (the "Debtors"), then the Debtors may, in their sole discretion, deem such payment to apply instead to any post-petition amount that may be owing to such payee or treat such payment as an avoidable unauthorized post-petition transfer of property.

For purposes of administering this trade program, as authorized by the Bankruptcy Court and in accordance with the terms of the Interim Order, the Debtors and [____] ("Counterparty") agree as follows (the "Agreement"):

The estimated balance of all prepetition amounts due and owing to [Counterparty] in these chapter 11 cases (net of any setoffs, credits or discounts) (the "Trade Claim") is [____].

The Debtors shall pay [Counterparty] [____] (the Settlement Amount) upon acceptance of this letter agreement and [Counterparty] waives the right to any further recovery (including, but not limited to, any right to recover under 11 U.S.C. § 503(b)(9)) or distribution with regard to the Trade Claim.

[Counterparty] agrees to supply goods/services to the Debtors on [____] day

CRITICAL VENDOR AGREEMENT (CONT'D.)

- An actual form critical vendor agreement proposed by Debtor and approved in major chapter 11 case (creditors beware!):

Consider including credit terms and credit limit

Consider reserving right to amend pricing

Consider including events of default to justify terminating credit:

1. Failure to pay settlement amount
2. Failure to timely pay invoices
3. Default under any prepetition supply agreement
4. Default under or loss of DIP financing
5. Conversion or dismissal of case

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payment terms, and the Debtors agree to pay [Counterparty] in accordance with such trade terms (the "Payment").

Any applicable open trade balance or credit line that [Counterparty] will extend to the Debtors for shipment of post-petition goods/services will be on an as needed basis and shall not be capped.

In consideration for the payment described herein, [Counterparty] agrees not to file against the Debtors, their estates, any other related person or entity, or any of the Debtors' respective assets or property (real or personal) any claim of lien (regardless of the statute or other legal authority upon which such claim or lien is asserted) related in any way to any remaining prepetition amounts allegedly owed to [Counterparty] by the Debtors for goods or services [Counterparty], provided to the Debtors prior to the Petition Date (such goods or services, "Prepetition Goods and Services"). Furthermore, if [Counterparty] has taken steps to file or assert any lien or liens for Prepetition Goods and Services prior to entering into this letter agreement, [Counterparty] agrees to take the necessary steps to remove such lien or liens as soon as possible.

After receipt of the Payment by [Counterparty], if [Counterparty] refuses to continue to supply goods or provide services to the Debtors in accordance with the Customary Terms for any reason other than mutual agreement of the Debtors and [Counterparty], the Debtors' breach of the Customary Terms or expiration of the Customary Terms in the ordinary course of business, then (i) any Trade Claim payment received by [Counterparty] may be deemed by the Debtors as an unauthorized post-petition transfer under section 549 of the Bankruptcy Code that the Debtors may either (a) recover in cash or (b) at the Debtors' option, apply against any outstanding administrative claim held by [Counterparty] and (ii) upon recovery of any Trade Claim payment, the corresponding prepetition claim will be reinstated in the amount recovered by the

CRITICAL VENDOR AGREEMENT (CONT'D.)

- **That's it?! Other potential provisions:**
 - Resurrection of allowed prepetition claim if settlement payment is clawed back
 - Automatic allowance, and payment in the ordinary course, of administrative expense claim for undisputed post-petition invoices
 - Preference waiver (court approval needed)
 - Or, if preference waiver is unavailable:
 - ❑ Preference claim is not a basis to withhold payment of administrative expense claim; and
 - ❑ Preservation of subsequent new value defense despite payment of prepetition claim
 - Confidentiality
 - Termination date (e.g., effective date of plan, sale of business, and/or fixed time period)
 - Binding on successors and assigns (including a chapter 7 trustee or post-effective date fiduciary!)

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Debtors.

Your execution of this Agreement and return of the same to the Debtors constitutes an agreement by [Counterparty] and the Debtors.

| PROOFS OF CLAIM

PROOFS OF CLAIM

- A formal proof of claim does not need to be filed in a Chapter 11 case unless you disagree with the amount or priority of your claim as set forth in the debtor's schedules of assets and liabilities, or your claim is listed as unliquidated, disputed or contingent
- Nevertheless, it is **almost always** a good idea, out of an abundance of caution, to file a proof of claim in every bankruptcy case in which you are a creditor, absent a compelling reason otherwise

Fill in this information to identify the case:

Debtor 1 _____
Debtor 2 _____
(Spouse, if filing)

United States Bankruptcy Court for the: _____ District of _____

Case number _____

Official Form 410

Proof of Claim

12/15

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 505. Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. Do not send original documents; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 305) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?
Name of the current creditor (the person or entity to be paid for this claim) _____
Other names the creditor used with the debtor _____

2. Has this claim been acquired from someone else?
 No
 Yes. From whom? _____

3. Where should notices and payments to the creditor be sent?
Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?	Where should payments to the creditor be sent? (if different)
Name _____ Number _____ Street _____ City _____ State _____ ZIP Code _____ Contact phone _____ Contact email _____	Name _____ Number _____ Street _____ City _____ State _____ ZIP Code _____ Contact phone _____ Contact email _____

Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____

4. Does this claim amend one already filed?
 No
 Yes. Claim number on court claims registry (if known) _____ Filed on _____
MM / DD / YYYY

5. Do you know if anyone else has filed a proof of claim for this claim?
 No
 Yes. Who made the earlier filing? _____

Official Form 410

Proof of Claim

page 1

PRACTICAL TIPS FOR PROOFS OF CLAIM

- **BE SAFE:** File your proof of claim as soon as the information upon which it is based can be accurately determined
- You do not want to be in a position where you are scrambling the day before the bar date to file your claim as **claims must be received by the bar date**, not postmarked (physically or virtually) by that date



PRACTICAL TIPS FOR PROOFS OF CLAIM

- Attach **supporting documentation**, e.g., statement of account, to your proof of claim (if voluminous, indicate that documents are available upon request)
- **Claims are Public Record** - Do not file confidential documents
 - Invoices, contracts, statements of work, and other documents might include confidential information (e.g., pricing, quantity, discounts, etc.)
- File the original proof of claim, include a copy of the claim and a self-addressed stamped envelope, and request that it be file-stamped as received and returned to you for your records
- File and/or send your proof of claim by overnight delivery or another form where you receive confirmation (NOT Email or fax), oftentimes to the debtor's claims agent or the clerk of the bankruptcy court
- Some courts and claims agents now also offer **online submission of proofs of claim**. In those instances, the bar date notice will contain instructions for accessing the online system



NOTICE OF DEADLINE TO FILE PROOFS OF CLAIM

- At a certain point during the case, the court will fix a deadline by which creditors must file proofs of claim
 - In Chapter 11 cases, the debtor often requests, through a motion, that the court set a deadline (the “bar date”) by which prepetition proofs of claim, oftentimes including 503(b)(9) claims, need to be filed
 - As indicated earlier, in certain cases a court may set the bar date and notify creditors of the bar date in the notice of commencement of case
 - If the case is initially filed under Chapter 7 the bar date is 70 days after the petition filing date, or a later date included in a separate notice
- Any claim not **actually received** by the required date will be disallowed (subject to certain extensions)
- Notice must be sent to all creditors **at least 21 days** before the deadline, but oftentimes more time is given
- **It is Crucial That Creditors Read, Understand, and Follow any Such Notice!**
 - **Reach out to in-house or outside counsel if necessary!**



| LATE-FILED PROOFS OF CLAIM

- If a Proof of Claim is not timely filed, it may still be worthwhile to file a late Proof of Claim
- If you establish that you neither had notice, nor actual knowledge, of the bankruptcy filing (i.e., not included on the creditor matrix or not served the bar date notice), you may be able to have your claim treated as having been timely filed if the estate's funds have not yet been distributed (i.e., no prejudice)



EXECUTORY CONTRACTS AND 363 SALES

| EXECUTORY CONTRACTS

- A Debtor has the power to assume, reject, or assume and assign their “executory contracts.” **Counterparties will receive notice of a debtor’s proposed decision**
 - The term “executory contract” is not defined in the Bankruptcy Code, but commonly defined to mean: *A contract between a debtor and third party under which both sides still have material performance obligations remaining*
- In a chapter 11 case, the debtor must decide to assume or reject an executory contract by confirmation of the plan, but can act earlier
- Both parties must continue to perform under the contract until assumption / rejection
 - **Receiving notice of a bankruptcy does not end the counterparty’s obligation to continue performance, only rejection does so**

| EXECUTORY CONTRACTS (CONTINUED)

- An executory contract cannot be enforced against the bankruptcy estate until it is assumed. The counterparty may file a motion seeking to compel the debtor to assume or reject prior to confirmation of the plan
 - This relief is oftentimes very difficult to obtain, especially if sought early in the case
 - Creditor can seek to obtain payment for any goods or services provided on credit post-petition
- If the contract is eventually rejected, the contract counterparty may file a claim for rejection damages, which is an unsecured claim and may be permitted to be filed after the general bar date
 - Such a claim is treated as a breach of the applicable contract as of the petition date.

| ASSUMPTION AND ASSIGNMENT

- In many cases, the debtor will seek to assume and assign the executory contract to a third party, usually a buyer of its assets. Counterparties will be notified before contracts are assumed/assigned
- Proposed cure amounts will generally be listed in a schedule attached to a notice sent to all counterparties
- The bankruptcy sale process often happens quickly. If a creditor disagrees with the cure amount or adequate assurance, **act fast**—contact the debtor and be prepared to quickly file an objection



| SECTION 363 SALES

- A creditor may receive notice of the proposed assumption or rejection of its contract in the context of a proposed sale of certain assets of the debtors
- If a creditor receives a sale motion, and hasn't previously received special notice in the case, it is likely that the creditor's rights are directly impacted
- Review any schedules annexed to the sale motion or subsequently filed pleadings, which may list a creditor's contract or lease and its proposed treatment (e.g., assumed/assigned/rejected; cure amount)



| SALE TIMELINE

- Bidding procedures / Sale motion filed
 - Objection deadline for bidding procedures
- Bid deadline
- Auction (if necessary)
- Sale objection deadline
 - Assumption/assignment/rejection objection deadline
 - Cure objection deadline
- Sale hearing
- *Watch for notices of assumption and assignment (i.e., “cure” notices)!





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CHAPTER 11 PLAN CONFIRMATION PROCESS

CHAPTER 11 PLANS

- A Plan proposes (and if confirmed and effective, establishes) the **classification and treatment of claims** against a Chapter 11 debtor
- Bankruptcy Court must approve a **Disclosure Statement** and **Solicitation Procedures** that the debtor uses to solicit votes on the plan
- Disclosure Statement: Describes the plan and must provide **adequate information** for voting creditors to make an informed choice
- **Stages of the Plan Process:**
 - **Proposed** by the Debtor (or, less likely, a third party)
 - **Votes Solicited** from Creditors by the Debtor
 - **Accepted** or **Rejected** by Creditors Voting
 - **Confirmed** (or **not**) by the Bankruptcy Court
 - **Effective** (or **not**) by the Plan's terms



| CHAPTER 11 PLANS

- Once **confirmed** and **effective**, a plan is effectively a **contract between the debtor, its creditors, and other stakeholders**
- A confirmed, effective plan **binds all creditors** – even if they voted to reject the plan or did not vote at all
- The obligations of the “Reorganized Debtor” under the plan take the place of its obligations that existed pre-confirmation
- The Bankruptcy Code prescribes a number of legal standards that a plan must meet to be confirmable
- If a class of creditors **votes to reject** the plan, but another impaired class **accepts** the plan, the plan **can still be confirmed** so long as the Bankruptcy Court finds that the plan is **fair and equitable to**, and **does not unfairly discriminate** against, the rejecting class

| SOLICITATION PROCEDURES & VOTING

- When seeking approval of the Disclosure Statement, the Debtor will also seek approval of “solicitation procedures”
 - Voting deadline
 - Form of ballots (including opt-out/opt-in mechanism for releases)
 - Confirmation Objection deadline
 - Confirmation Hearing date
- Voting on Plan
 - By class
 - Acceptance: 2/3 in amount and 1/2 in number based on creditors actually voting in each class



DUAL-TRACK: SIMULTANEOUS PLAN AND SALE PROCESS

- Many chapter 11 cases follow a **dual-track strategy**
 - *Nearly all retail chapter 11 filings start out this way*
- Debtor **markets its business for sale** (pre- and/or post-petition) while simultaneously **negotiating a plan of reorganization** with secured lenders and other key creditor constituencies (including a creditors' committee)
- Stated goal is usually a **going-concern sale**, in which the buyer **continues operating the debtor's business**, assumes certain liabilities, and takes on certain executory contracts (via assumption and assignment by the debtor)
- Dual-track processes frequently result in an **asset sale** under section 363 of the Bankruptcy Code (sale of assets free and clear of liens, claims, encumbrances, and interests) followed by a **plan of liquidation** that winds down the debtor after reconciling claims, liquidating its remaining assets, and making distributions
 - Liquidation frequently involves pursuit of litigation claims (preference, D&O, and otherwise)



PREPACKAGED VS. PRENEGOTIATED CHAPTER 11 PLANS

Prepackaged (“Prepack”)	Prenegotiated
Plan has been solicited in advance and accepted by voting classes	Plan Support Agreement (PSA) has been negotiated with certain classes
Confirmation occurs very quickly – sometimes 60-90 days post-filing <i>Belk</i> : Drive-through chapter 11 (in and out of bankruptcy in 24 hours!)	Plan still needs to be filed and votes solicited – may take months or years <i>Caesars</i> : Took <i>nearly two years</i>
Trade claims typically paid in full after confirmation or per their terms	No certainty as to treatment of trade claims – typically impaired , sometimes severely. Critical vendors may be treated better.
Pre-filing vote solicitation provides (near) certainty that impaired, objecting classes will be crammed down	No certainty as to how any creditors besides the PSA parties will vote – objecting creditors may hijack process
Typically no creditors’ committee	Almost always a creditors’ committee
Minimal risk of administrative insolvency	Risk of administrative insolvency
Preference claims <i>usually</i> waived	No certainty re: preference waiver
Minimal operational disruption	Risk of significant operational disruption

SUBCHAPTER V: SMALL BUSINESS CHAPTER 11 CASES



“SMALL BUSINESS DEBTOR” PROVISIONS

- The Small Business Reorganization Act (the “SBRA”) allows for chapter 11 protections on a faster and cheaper timeline, and includes other provisions streamlining the case and exit from it
 - The SBRA permitted any business with a maximum aggregate debt of \$2,725,625 (which is now \$3,424,000 effective as of April 1, 2025) to file chapter 11 a “small business debtor”.
 - The CARES Act, enacted on March 27, 2020 due to COVID-19, increased the maximum aggregate debt limit for small businesses debtors (excluding affiliates/insiders) to \$7,500,000, not less than 50% arising from debtor’s commercial or business activities
 - Expired on March 27, 2022 and debt limit reverted back to lower amount
 - **The Bankruptcy Threshold Adjustment and Technical Corrections Act, enacted on June 21, 2022, extended the \$7.5 million debt eligibility threshold (retroactive to the prior expiration date).**
 - **Increased debt limit expired on June 21, 2024**
 - **Congressional efforts to restore \$7.5 million debt limit on permanent basis**
 - SBRA dollar amount (noted above) is subject to increase every 3 years for inflation



SBRA: KEY PROVISIONS DESIGNED TO REDUCE COSTS AND EXPEDITE SUCCESSFUL COMPLETION OF CASES

- Elimination of Creditors' Committees
- Elimination of U.S Trustee fees
- Appointment of standing trustee
- Separate Disclosure Statement is not required
- Eliminates absolute priority rule in connection with plan confirmation if certain requirements are met
 - i.e., equity holders may retain their equity, even if creditors are not paid in full, so long as projected disposable income is paid to creditors over the 3-to-5-year life of the plan
- Risk of deferred payment of administrative claims over duration of plan



POST-EFFECTIVE DATE MATTERS

| POST-EFFECTIVE DATE TRUSTS

- Types:
 - Liquidating or GUC Trusts
 - Litigation Trusts
 - Other (Tort, Environmental)
- Purpose – to receive and liquidate estate assets, and distribute the proceeds of such assets to holders of allowed claims
- Activities:
 - Claims Reconciliation
 - Prosecuting Causes of Action
 - Distributions



| CLAIMS RECONCILIATION

- The claims reconciliation process may take several months, or several years, depending on the size and nature of the case and claims pool
- Distributions are generally paid by a distribution agent or liquidation trustee
- Unless creditors receive an objection or other notice, they do not need to do anything to protect their claim
- However, a distribution agent or liquidation trustee may require a W-9 or other tax documentation as a prerequisite to receiving a distribution, which should be sent promptly
- Creditors should also provide prompt notice of any change of address
- Creditors may receive one or more distributions, depending on the recovery provided in the plan and the course of the claims reconciliation process

| ALLOWANCE OF CLAIMS

- Distributions are only made to creditors whose claims are “allowed”
- A claim or interest is deemed allowed if:
 - scheduled by debtor (i) in a liquidated amount, (ii) not disputed, and (iii) non-contingent,or
 - a proof of claim is filed by claimant and no party-in-interest objects to allowance thereof
- In many cases, the process of determining which claims are allowed begins only after—sometimes a long time after—a chapter 11 plan has been confirmed
- A debtor or bankruptcy trustee generally has 90-180 days (specified in each plan) from the effective date of the plan to object to claims, but courts liberally grant extensions of that deadline with cause



| OBJECTIONS TO CLAIMS

- Ordinarily, if an objection to a claim is filed, the court determines the amount of the claim as of the date of filing of the bankruptcy petition, and allows the claim unless the claim is subject to disallowance under section 502 of the Bankruptcy Code
- It is possible for a claim to be reduced rather than completely disallowed or the objection will concern the classification of the claim (i.e., section 503(b)(9) → general unsecured claim)
- If your claim is objected to, you will receive notice **at least 30 days** prior to the hearing
 - Carefully review the objection **and any exhibits** to determine the basis for the objection to your claim
 - Many objections are “omnibus” objections, which may include objections to many claims on the same grounds
 - If you disagree with the grounds stated in the objection, the first step is to contact the party that filed the objection



| PREFERENCES



A TWO-MINUTE PREFERENCE REFRESHER: *WHAT IS A PREFERENCE?*

Elements of a Preferential Transfer	Practical Considerations
<p>A transfer of property of the estate</p>	<p><i>Typically but not always a payment – check, wire, etc.</i></p>
<p>to or for the benefit of a creditor,</p>	
<p>on account of an antecedent debt,</p>	<p><i>No debt, no preference – cash in advance/ prepayments are not preferences at all</i></p>
<p>made while the debtor was insolvent,</p>	
<p>on or within 90 days before the filing of the petition (one year for insiders)</p>	<p><i>Presumption of insolvency for transfers within 90 days is rebuttable with evidence</i></p>
<p>that enables the creditor to receive more than it would in a hypothetical chapter 7 liquidation where the transfer was not made and the creditor received payment according to the Bankruptcy Code</p>	<p><i>If you did not fare better than if the allegedly preferential transfer had not been made, the debtor filed chapter 7, and you were paid pursuant to the Bankruptcy Code, no preference (i.e., less than 100% recovery under plan)</i></p>
<p>Trustee due diligence requirement</p>	<p><i>Who has the burden of proof?</i></p>

A TWO-MINUTE PREFERENCE REFRESHER: *COMMON DEFENSES*

Defense	Description
Contemporaneous Exchange of New Value	<i>Payment was intended to be, and was, a substantially contemporaneous exchange of new value</i>
Subsequent New Value	<i>Creditor provided new value – extensions of credit – to the debtor after receiving the preferential transfer.</i>
Ordinary Course of Business	<i>Transfer was payment of a debt incurred in the ordinary course of business or financial affairs of the debtor and creditor, and</i> <ul style="list-style-type: none"><i>• Made in the ordinary course of business or financial affairs of the debtor and the creditor (subjective test), <u>or</u></i><i>• Made according to ordinary business terms (objective test).</i>

PREFERENCE DEFENSES: NEW VALUE

- Frequently-litigated new value defense issues:
 - Does the new value defense apply to invoices that were:
 - Repaid prior to the bankruptcy filing?
 - Repaid post-petition pursuant to a critical vendor or other similar order?
 - Entitled to priority status under section 503(b)(9) and repaid/reserved for post-petition pursuant to a court order?
 - YES! According to the recent Eleventh Circuit decision in *Auriga Polymers Inc. v. PMCM2, LLC*

SUBJECTIVE COMPONENT OF ORDINARY COURSE OF BUSINESS DEFENSE-LITIGATED ISSUES

- Courts have been inconsistent and unpredictable in applying the subjective component of the ordinary course of business (“OCB”) defense, resulting in expensive and time-consuming litigation
 - How long before preference period?
 - Full range?
 - Modified Range? Removal of outliers?
 - When Debtor is healthy?
 - Deviation off average or mean?
 - Comparison of average days to pay between pre-preference and preference periods?
- Each side can pick and argue for the methodology that supports its position



SUBJECTIVE ORDINARY COURSE OF BUSINESS PREFERENCE DEFENSE – FACTS THAT DEFEAT SUBJECTIVE ORDINARY COURSE OF BUSINESS ON THE NUMBERS

- Consistency in timing of payments before and during the preference period alone might **not be** sufficient to prove the subjective component of the OCB defense
- Threats to subjective component, which are very fact-specific:
 - Change in the type of payment during preference period (regular check to wire, ACH, etc.)
 - Change in method of invoicing (electronic vs. paper)
 - Change in credit terms
 - Imposition of credit limit/enforcement of existing credit limit
 - Imposition of credit holds; threats of and actual stoppage of shipment
 - Escalating collection communications to debtor’s senior management
 - Change in mode of delivery (regular mail to Federal Express or hand delivery)

ORDINARY COURSE OF BUSINESS PREFERENCE DEFENSE – ORDINARY BUSINESS TERMS ALTERNATIVE: OBJECTIVE COMPONENT

- Proof requirement is constantly evolving
 - General Standard? Transfer was not so unusual or idiosyncratic as to render it an aberration in the relevant industry – Seventh Circuit Court of Appeals decision
- Which industry to consider? Creditor’s? Debtor’s? Combination? General business practices?
- Includes range of industry terms
 - No need to prove single set of business terms within an industry
 - Ordinary business terms may vary widely across industries
- (Relatively) Recent win for the trade: *In re Center City Healthcare, LLC* (District Court, Delaware, 2025)
 - Data from Risk Management Association (RMA) may be relied upon to establish the “days to pay” for a given industry
 - Collection activity, even if extraordinary or unusual, is not relevant to the objective OCB defense

REACT AND RESPOND TO INITIAL PREFERENCE DEMAND LETTER

- **DO NOT IGNORE DEMAND**
 - Trustee could raise ignored demand as support for satisfying new due diligence obligation
 - Immediately notify the legal department
- Request a list of all checks relating to the claim and copies of cancelled checks or proof of wire/ACH transfers, with remittance instructions
- Confirm that all payments were actually received
 - Check for NSF, return to maker, etc.
 - If payments not actually received, request that the trustee/debtor withdraw demand
- Confirm the date when each payment cleared the debtor's account
 - If more than 90 days, there is no preference
- 2-year statute of limitations: has it expired, or is it about to expire?
- Can you actually be sued?
 - LESS THAN \$8,575 (effective 4/1/25; previously was \$7,575) IN THE AGGREGATE, NO
 - Trustees are likely to send demand letter anyway
 - Where can the Trustee sue you? Potential venue limitation



| PRE-SUIT PREFERENCE CHECKLIST

- Consult outside bankruptcy counsel
- Create preference defense analyses, including new value and subjective OCB defenses
 - Identify SIC and NAICS numbers for objective OCB defense
- Was the debtor insolvent during the preference period?
 - Check the schedules
 - Check any financial statements you may have received from the debtor
- Develop a settlement gameplan and negotiation/settlement thresholds
- Communicate defenses to the trustee
- **NOTE:** Pre-lawsuit discussions might not happen if demand is sent/received too close to the expiration of the statute of limitations; the trustee may not have time to negotiate



PREFERENCE CHECKLIST ONCE LAWSUIT IS COMMENCED

- Immediately notify legal department and outside bankruptcy counsel!
- Check all dates!
 - Was the lawsuit commenced before the statute of limitations expired
 - If so, determine your answer deadline (often 30 days from issuance of a summons), unless there is a procedures order entered in the case, which could extend the deadline
 - **DO NOT ALLOW A DEFAULT JUDGMENT TO BE TAKEN! TIMELY CONTACT YOUR BANKRUPTCY ATTORNEY IF AN EXTENSION IS NOT GRANTED**



10 QUESTIONS





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Education

University of Pennsylvania Law School (J.D. 1980)

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U.S. Court of Appeals for the Second Circuit

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With nearly 45 years of experience in the bankruptcy and insolvency space, Bruce Nathan is a recognized leader in trade creditor rights and the representation of trade creditors in bankruptcy and other legal matters. He has represented trade and other unsecured creditors, unsecured creditors' committees, secured creditors, and other interested parties in many of the larger Chapter 11 cases that have been filed. Bruce also handles letters of credit, guarantees, security, consignment, bailment, tolling, precious metals leases, and other agreements with financially distressed counterparties, as well as other credit-related legal issues for institutional clients.

Bruce's experience spans a broad range of industries, including agriculture, food and beverage, paper, publishing, media, floor covering, furniture, chemicals, manufacturing, and precious metals. His recent creditors' committee engagements include MVK FarmCo (dba Prima Wawona), Pegasus Home Fashions, Nielsen & Bainbridge (NBG Home), and Gold Standard Baking.

BRUCE S. NATHAN

With a national creditors' rights practice, Bruce has recently advised trade and other unsecured creditors in a broad range of complex matters, including:

- Representation of a precious metals lessor in the Instant Brands Chapter 11 case
- Representation of a pipe supplier in conjunction with the enforcement of its statutory mechanic's / materialman's lien rights in the Chapter 11 cases of MDC Energy and EdgeMarc Energy Holdings
- Representation of three major book publishers and two major paper-product manufacturers and distributors in the Chapter 11 cases of LSC Communications.

Bruce is a frequent presenter at industry conferences throughout the country, as well as a prolific author on bankruptcy and creditors' rights topics. His articles frequently appear in publications by the National Association of Credit Management, Credit Research Foundation (CRF), and the American Bankruptcy Institute (ABI). He is a co-author of "Model Business Credit Application and Terms and Conditions of Sale," published by CRF and Lowenstein Sandler in 2023; "A Business Guide to Antitrust for Credit Professionals," initially published by CRF and Lowenstein Sandler in 2020 (updated in 2023); and "Trade Creditor's Risk-Mitigation Tools and Remedies Manual," published by ABI in 2019.

Bruce is a former member of ABI's Board of Directors, former co-chair of ABI's Unsecured Trade Creditors' Committee, and former co-chair of the Avoiding Powers Committee that worked with the ABI Commission to Study the Reform of Chapter 11.



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Michael Papandrea provides counsel to debtors, creditors' committees, individual creditors, liquidating trustees, and other interested parties with respect to corporate bankruptcy and creditors' rights matters, including bankruptcy-related litigation.

Reliable and efficient, Mike is appreciated for his innate ability to effectively apply and convey his understanding of the law and general business principles with respect to complex issues, both while providing advice to clients and while aggressively advocating on their behalf. Mike works tirelessly to understand clients' needs and provide practical solutions that are reasonable, balanced, and favorable to the clients he serves.

Mike enjoys keeping clients and relevant industry professionals in the loop regarding bankruptcy, insolvency, and creditors' rights issues, regularly writing articles for and speaking to professionals in the credit and risk management space. Mike also takes pride in his commitment to the community and provides pro bono representation to individuals and nonprofit organizations regarding bankruptcy and foreclosure-related matters..

Mike has been recognized by the *American Bankruptcy Institute's* 40 Under 40 program, which honors emerging leaders in the insolvency profession who are committed to the highest standards of achievement at work and in their communities.

Prior to joining the firm, Mike held multiple clerkships in the U.S. Bankruptcy Court; he clerked for the Hon. Jerrold N. Poslusny, Jr. (District of New Jersey), the Hon. Ashely M. Chan (Eastern District of Pennsylvania), and the Hon. Gloria M. Burns (Chief Judge, District of New Jersey). Mike applies the valuable insights learned from working closely and directly with these members of the judiciary to his everyday practice.

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**THANK
YOU**