



TRANSPORTATION REVENUE MANAGEMENT GROUP 2009 SPRING CONFERENCE NEW ORLEANS, LA



Bankruptcy Tips Tricks and Alternatives



Presented by:

Steven D. Sass, Esq.
RMS Vice President, Legal Services

Phone: 410.773.4040 or e-mail: steven.sass@rmsna.com





Presenter Introduction

- **Steven D. Sass, Esq. - Vice President RMS Legal Services**
 - **Attorney - Admitted to the Maryland and Federal Bar**
 - **MBA in Management**
 - **18 Years with RMS and D&B**
 - ? **Former VP and Assistant General Counsel of ACI**
(Now Euler/Hermes ACI-Largest mono-line credit insurer in N.A.)
- **18 years experience in Bankruptcy Industry**
- **Served on major creditor's committees back to early 1990's including:**

Ames	Hills	Bombay Stores
Hills	Lionel	Fanny May Candies
Warnaco	Maidenform	
Sharper Image	Schwinn	
- **RMS Represents creditors in many industries:**
 - Transportation Technology Insurance**
- **Acts as trustee in a few select bankruptcies**





The Fine Print

- Most bankruptcy issues are governed by the U.S. Bankruptcy Code
- Each District/Circuit can have its own rules but only when USSC rules is it final and applicable to all
 - Your District/Circuit may differ
- After formulating your plan based on discussions here and subsequent, review with your legal advisors before taking action





Agenda

- I. Introduction
- II. Basics
 - A. U.S. Bankruptcy Court Options
 - B. Non-Bankruptcy Insolvencies
 - C. Key Issues in Bankruptcy
- III. Tips and Tricks
 - A. Claims Issues
 - B. Opportunities to Enhance Your Recoveries
 - C. Opportunities to Reduce Your Losses
 - D. Liens on Goods in Transit
 - E. Post-petition business
 - F. What to Expect/When or If to Write-off
- IV. Your Next Steps (comply with law/reduce costs/losses/increase recoveries)
 - A. Review Your Process
 - B. Process Check-List





US Bankruptcy Court Options

- Chapter 7 – Liquidation
 - Court Appointed Trustee “Winds Down” the Company
 - Expect No Recovery & Estate/Trustee May Pursue Preferences
 - Fairly Fast – Not Expensive for Debtor
- Chapter 13 – Wage Earners Restructuring
 - Some Payment is forthcoming - usually
 - Often Small Percentage of \$ Outstanding
 - Paid Out Over Long Time – Often 60 Months
 - Payments can be very small (\$5 or \$10)
 - No all creditors included in bankruptcy

**AFTER FILING OF ANY CHAPTER,
CREDITOR MUST CEASE ALL
COLLECTION OR ENFORCEMENT
ACTIONS OR FACE SUIT/PENALTIES**





Basics (Continued)

US Bankruptcy Court Options

- Chapter 11 – Re-Organization
 - The “traditional bankruptcy”
 - Offers greatest likelihood of recovery
 - Often see 10%, 20%, 30% recoveries (also often 0%)
 - Most opportunity to enhance recoveries (even though everyone in the same creditor class is supposed to get same percentage – we work to increase rate to all and to our customers with specials).



For most of our customers, Chapter 11 represents only 25% of their bankruptcies - but fully 75% of their \$ exposure !



Basics Non-Bankruptcy Court Options

- Most Non-Bankruptcy Court Options are really non US Bankruptcy Code/Court Options – regulated by State law
- Vary from State to State
- More Common:
 - “Going out of Business” or Out of Court Liquidation
 - “Assignment for the Benefit of Creditors” or “ABC”
 - “Receivership”
 - There are up to 20 different names for the various types of insolvencies – but the above are quite common





Non-Bankruptcy Court Options (Continued)

- **Receivership**
 - Most common in regulated industries
 - Eg. Banking, Insurance, Telecom
 - Can be used in many industries
- **State Court Bankruptcies**
 - Largely similar to receivership
 - Can be less costly and faster for Debtor
- **Assignment for the Benefit of Creditors**
 - aka 'ABC'
 - Very common in CA until Sherwood Partners case
 - Still used in CA, IL, OH, MI, WI and others
 - Facilitated by select Assignees you may see regularly





Non-Bankruptcy Court Options (Continued)

- Handling of Non-Bankrupt Insolvencies
 - Confirm which companies are involved
 - Generally safest to assume similarity to Bankruptcy Code bankruptcies
- Key Issues
 - Preferences: Often handled similarly to U.S. Bankruptcy Code except for:
 - Look-back period length
 - Applicability of Defenses: limited or non-existent
 - Liens: Since controlled by State Law anyhow – interacts well with State Court insolvencies



Key Issues in Bankruptcy (Continued)

- Automatic Stay Provision
 - Upon filing of any Chapter – any and all enforcement actions must cease
 - No suits, no collection, NO INVOICING
 - Carefully eliminate pre-petition invoice amounts from any post-petition balances
 - If at all possible – don't show on statements
 - Significant penalty exposure for violation



Key Issues in Bankruptcy (Continued)

- Trustee vs. Trustee
- US Trustee
 - Government (Justice Department) official charged with overseeing flow of case and the U.S. Government's position on issues
- Court-appointed Trustee (= Receiver)
 - Appointed by Court to run company in absence of old management (Old Management in place = Debtor in Possession)



Key Issues in Bankruptcy (Continued)

■ Avoidance Actions

- Section 544: Fraudulent Conveyances
 - Creditor got paid and company did not get value (common where debtor orders through one entity and pays through another entity)
- Section 547: Preferences
 - Payments received by creditors within 90 days prior to the filing of a bankruptcy
 - IF YOU GET A LETTER DEMAND OR A LAWSUIT – DON'T SEND A CHECK – THERE ARE DEFENSES & YOU NEVER PAY 100%.





Section 547 – Preferences (Continued)

- IF YOU GET LETTER DEMAND OR LAWSUIT – DON'T RETURN PAYMENT – THERE ARE DEFENSES & YOU NEVER PAY 100%.
- **DEFENSES:**
 - New Value: Additional credit granted after receipt of potentially preferential payment. Usually “off-sets” preference demand
 - Ordinary Course: Can be “ordinary course between the parties” or “ordinary course for the industry”.
 - NV is black & white; OC is all gray



Section 547 – Preferences (Continued)

- How to Protect Yourself from Preferences
 - COD OR CASH IN ADVANCE (CIA)
 - Maintain good collection practices
 - Establish/Maintain written procedures & follow them religiously
 - When anticipating bankruptcy monitor payment and invoicing flow and for large exposures, calculate your defenses before there is a loss





Tips & Tricks – Claims Issues (Continued)

- File your claim ASAP
 - Avoid risk of missing Bar Date (there are no good excuses if you miss bar date)
- If you don't know exact amount – file with your best estimate at that time and amend
- Claim can usually be amended for a long time – usually even after bar date
- Send with a second copy of the claim form and a self-addressed stamped envelope and a note asking for a “Court Stamped return copy)
- If your balance changes – amend your claim
- Separate unsecured and priority on claim



Tips & Tricks – Claims Issues (Continued)

- Unsecured claim
 - Your usual trade claim
 - Open account or under contract
 - Not secured – you’re not holding collateral
- Priority claim: Post-petition balance
 - If you continue to sell/service Debtor
 - About 60 days into case – see if they have an unpaid balance
 - File claim as admin claim and cite code section on the form



B 10 (Official Form 10) (12/08)

B 10 (Official Form 10) (12/08)

UNITED STATES BANKRUPTCY COURT «District» DISTRICT OF «State» «Location»		PROOF OF CLAIM
Name of Debtor: «Debtor_name»		Case Number: «Case_No»
NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of a administrative expense may be filed pursuant to 11 U.S.C. § 503.		
Name of Creditor (the person or other entity to whom the debtor owes money or property): Name and address where notices should be sent: «Customer» c/o RMS Bankruptcy Recovery Services PO Box 5126 Timonium, Maryland 21094 Telephone number: (410) 773-4088		<input type="checkbox"/> Check this box to indicate that this claim amends a previously filed claim. Court Claim Number: _____ <i>(If known)</i> Filed on: _____
Name and address where payment should be sent (if different from above): Same as above Telephone number: _____		<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars. <input type="checkbox"/> Check this box if you are the debtor or trustee in this case.
1. Amount of Claim as of Date Case Filed: \$«PoCAmt» If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4. If all or part of your claim is entitled to priority, complete item 5. <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.		5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount. Specify the priority of the claim. ? Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B). ? Wages, salaries, or commissions (up to \$10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier – 11 U.S.C. §507 (a)(4). ? Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5). ? Up to \$2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7). Taxes or penalties owed to governmental units – 11 U.S.C. §507 (a)(8). ? Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(____). Amount entitled to priority: \$ ____«Priority» <i>*Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.</i>
2. Basis for Claim: _____ Service _____ (See instruction #2 on reverse side.)		
3. Last four digits of any number by which creditor identifies debtor: «Account_No» 3a. Debtor may have scheduled account as: _____ (See instruction #3a on reverse side.)		
4. Secured Claim (See instruction #4 on reverse side.) Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information. Nature of property or right of setoff: ? Real Estate ? Motor Vehicle ? Other Describe: _____ Value of Property: \$ _____ Annual Interest Rate ____% Amount of arrearage and other charges as of time case filed included in secured claim, if any: \$ _____ Basis for perfection: _____ Amount of Secured Claim: \$ _____ Amount Unsecured: \$ «total Unsecured»		
6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim. 7. 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. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (See instruction 7 and definition of "redacted" on reverse side.) DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.		
Date: _____ Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any. «POC_Filed» _____ <small>Maria Politis-Mastrogiannis, RMS, Agent for Creditor</small>		FOR COURT USE ONLY
<small>Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.</small>		

Use the correct Proof of Claim form. Changed in December '08.

Form available on Bankruptcy Court web-sites or call RMS: 410-773-4038



Opportunities to Enhance Your Recovery

- **Critical Vendor**
 - If it is difficult, expensive or time-consuming for Debtor to replace you – you may be eligible for Critical Vendor. (eg Logistics)
 - Must be requested BY DEBTOR via a Motion with the court – you cannot force this to happen
 - Usually in first few weeks of case & only where Debtor has funds (look for DIP financing)
 - Cannot be used in 7th Circuit (IL, IN, WI) as it was eliminated by K-Mart case. Not being followed by most other Circuits.
 - Must “cure” (pay pre-petition balance due)



More Opportunities to Enhance Your Recovery

■ Executory Contract

- Must be contract for services & both parties must have remaining obligations to perform (eg. you're required to provide services, & they must purchase at least \$X, etc.)
- Debtor may “accept or reject” contract; you can file “Motion to Compel Assumption or Rejection of Contract”
- If assumed, must “cure” = pay pre-petition balances.





More Opportunities to Enhance Your Recovery

■ Administrative Claim

- We recommend that 60 days into the case, if you are still doing business with Debtor, check balances
- If they are in arrears – use admin claim option
- Faster than collection process to Court
- WATCH FOR SEPARATE ADMINISTRATIVE CLAIM BAR DATE AFTER WHICH YOU LOSE YOUR RIGHT TO FILE AND ADMIN CLAIM



More Opportunities to Enhance Your Recovery

- **Dismissed Cases**
 - Not infrequently, Debtor case is **DISMISSED** from the bankruptcy court (not Discharged, Dismissed)
 - This account can go back into collection at that time as the Automatic Stay Provision of the U.S. Bankruptcy Code no longer applies when dismissed.
 - Watch however as most dismissed end up back in bankruptcy (with Automatic Stay Provision protection) within a few weeks or months





Final Opportunities to Reduce Loss & to Enhance Your Recovery

- Post-petition business: A bankruptcy does not automatically mean you don't want the business. If there is financing – can be quite lucrative & high margin
- When/What to write-off: This is individual accounting decision and risk-tolerance management decision. Most common answer: Write off at filing and take in as income if/when there is a recovery
- Fire customer ?: Remember, if on open account, you are generally NOT required to continue to do business with the Debtor. Even with a contract – watch for their contract breach (Check with your legal advisor)



Next Step – FOR YOU

- Review your current bankruptcy handling protocol
- If you don't have one – implement one: a controlled process **ALWAYS** results in greater recoveries
- Create a check-list for your bankruptcy handling and your decision-point options (much like the litigation check-list you probably use to determine when to sue and when to ignore an overdue balance you and your outside collection agency haven't been able to collect).



Special Q&A for Discussion

Q: Should I switch terms if customer is in trouble ?

A: You may reduce exposure – but you may damage your preference defense

Q: Personal guarantees ? Should I bother ?

A: Can be great – but individuals OFTEN file at the same time or with their business – particularly for proprietorships and very small companies

Q: Does COD protect me ?

A: You may reduce exposure – but you may damage your preference defense



Final Step

Remember – these are generalities for management consideration

Before implementing in your office check with your legal advisor to determine which are appropriate in your situation and **LEGAL** in your state(s).

