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CLIENT ADVISORY

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PREFERENTIAL TRANSFERS: DEFEND YOURSELF AGAINST THE “DOUBLE WHAMMY”

How to fight the bankruptcy trustee’s demands for payment

It is bound to happen sooner or later. Your customer files bankruptcy. You do your investigation, you ride it out, decide it’s a dead end and that you should go ahead and bite the bullet and write it off. Then weeks, months or even years later you get a letter (or pleading) from someone representing the debtor’s bankrupt estate demanding that you return a payment you received just before bankruptcy. The letter calls it a *preferential payment* and states that you weren’t entitled to it in the first place. You’ve been hit with a *double whammy*. Not only do you have a deadbeat debtor, but now you’re supposed to send money *back to the debtor’s bankrupt estate!*

After grumbling incoherently, your first instinct may be to just go ahead and send a check. After all, you don’t want any prolonged legal hassles and the letter looks so... *official*. What should you do?

Rule number one is: DO NOT IMMEDIATELY SEND THAT CHECK!

Rule number two is: TALK TO YOUR BANKRUPTCY ADVISOR AND INVESTIGATE THE CLAIM!

There are ways to reduce your risk in this situation and to defend against that preference claim. Take a careful look at the deadline for returning the payment set forth in the letter or pleading. Talk to your lawyer. Get an extension. You need to understand why the trustee is demanding the return payment, what hurdles *he has to clear* before you are compelled to send back any money and whether you have any defenses to the claim.

(more)

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It is the trustee's job to make sure that all payments to a bankrupt's creditors are reviewed in accordance with the laws that govern preferences. Trustees may, on occasion, make demand upon everyone who received any payment from the debtor during the "preference period." In order to prevail in an action to compel a return of the payment, the bankruptcy trustee has to prove that the payment:

1. Was made to or for the benefit of a creditor;
2. Was on account of antecedent debt owed by the customer before the payment was made;
3. Was made while the customer was insolvent;
4. Was made on or within 90 days before the date of the Bankruptcy Petition; and
5. Enabled the recipient to receive more than it would receive if there was a liquidation of the customer's bankruptcy estate.

There are a number of defenses to these elements. For instance, you may be able to prove that the payment was made in the "ordinary course of business" or you could have a "subsequent new value" defense. If you are not sure of your defenses, you may want to consult with an attorney before cutting that check. The law of preferences may actually be on your side. And even if it turns out the payment is a preference, you may still be able to mitigate your losses. When faced with sophisticated resistance, it is not unusual for the bankrupt estate to accept a reduced amount to settle the claim. Take the time to investigate your options thoroughly. You have little to lose and everything to gain.

For more information, please contact Bob Bernstein or Chuck Bobinis at the Bernstein Law Firm, P.C. at 412-456-8100 or toll free at 1-800-927-3197; email: bob@bernsteinlaw.com.

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Bernstein Law Firm, P.C. is a full service creditor's rights and bankruptcy law firm that can assist clients nationwide regarding preferential payment claims.

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