



My Customer Filed Bankruptcy—What Should I Do Now?

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First, confirm there has been a filing.

- Not all cases get filed.
- Or if they are filed, they may be filed the next day.
- So, your first job is to confirm that the filing actually happened.
- Easiest way to do that is to ask your customer to tell you the case name, the case number and the name of the court where it was filed. Also when it was filed.
- Once you get that information you can call the court or go on line to confirm.

Second, find the case.

- If your customer won't return your call or send you the information about the case, you can find it yourself.
- A case will be filed where the debtor is formed or where its principal assets are located.
- Go on line and type in the words "United States Bankruptcy Court" and then insert the state where debtor was formed or where physically located.
- Go to the websites until you locate the right one and then call or use PACER to learn about the case.
- PACER is a fee based service that keeps all information.

Third, determine the type of case.

→ There are 4 types of filings:

- Chapter 7—trustee liquidates all assets and pays creditors
- Chapter 13—individuals and small businesses “reorganize” by paying over a 5 year period
- Chapter 9—municipalities
- Chapter 11—reorganize and stay in business, or sell assets as a “going concern”

Chapter 7 Bankruptcies

- No Traditional “First Day” Hearings
- No “Critical Vendors” because no reorganization
- Usually business stops running upon filing
- No Creditors’ Committee Appointed
- Chapter 7 Trustee is appointed by the Court, and liquidates all of the Debtor’s assets
- Creditors get a distribution out of the “pot” of money created from the Chapter 7 Trustee’s sale

How does this affect me?

- If a Debtor Files for Chapter 7, Should I Continue to Supply Goods or Services? NO
 - Almost all businesses stop operations and fire all employees upon filing for Chapter 7 bankruptcy.
 - Goods or services provided post-petition will not meet the standard for an “administrative expense” claim, and will not be paid.
 - When in doubt, have your lawyer contact the Chapter 7 Trustee.

Chapter 13 Bankruptcies

- No "First Day" Hearings
- No "Critical Vendors" Usually Allowed
- No Creditors' Committee Appointed
- Plan is filed with bankruptcy Petition
- Chapter 13 Trustee monitors Debtor's compliance with plan, collects monthly payments from Debtor, and distributes funds.
- Plans can last as long as 5 years

What on earth is a chapter 9???

- Not often used
- Orange county California is an example
- Water districts
- Some hospitals
- May run into one. Sort of like a chapter 11 but not exactly.
- Some government entities which file are required by law to keep taxing until all debts are paid. So, don't just write it off.

Chapter 11 Bankruptcies

- What you will traditionally see in a business setting
- "First Day" hearings
 - "Critical Vendors" and other motions
- The United States Trustee will determine whether to appoint a Creditors' Committee.
- A Plan is usually filed later in the case, and may either seek liquidation of the company's assets, or attempt to reorganize the company's business.
- You may be obligated to continue providing goods or services, even after the bankruptcy.

Next, if you get wind of this early enough, try to figure out what is happening on the First Day.

- What will be heard in "First Day" hearings?
 - Has a website been set up where you can view documents for free?
 - Can you get on PACER and see what is set for hearing?
 - If you have a large claim, you may need to arrange to have counsel there for you.

Next Basic Steps

- **Figure out your exposure:**
 - Are you currently owed money?
 - Are you secured? If so, are you perfected?
 - When was the last time you were paid?
 - Right before the bankruptcy filing?
 - Right after the bankruptcy filing?
 - Are you holding a check that hasn't been cashed yet?
 - Are goods "in transit" to the Debtor that haven't been paid for?

Check the pleadings on file

- The Debtor may file its Schedules and Statement of Financial Affairs on the "First Day" and they may be on the web already, so check to see:
 - Is your claim listed at all?

 - Is your claim listed in the right amount?

 - Is your claim listed under the right entity?

Do I have to keep doing business?

→ Supplying Goods to a Debtor After the Filing

- Do I have to continue to supply goods? Maybe . . .
 - Do you have a contract with the Debtor?
 - If you have a contract, is the Debtor current?
 - If you don't have a contract, are your products "unique?"



What is a critical vendor and can I be one?

→ Critical Vendor Status

- What is a "Critical Vendor" anyway?
- How does a Debtor determine who gets picked as a "Critical Vendor?"
- You can be the squeaky wheel.



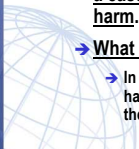
How is critical vendor status achieved?

→ Can a Debtor designate "Critical Vendors" through a "First Day" hearing?

→ **Bankruptcy Rule 6003-** states that "Critical Vendors" cannot be approved, Debtor's counsel cannot be retained, and leases or executory contracts cannot be either assumed or rejected during the first 20 days of a case absent a showing of immediate and irreparable harm.

→ What is "Immediate and Irreparable Harm?"

- In the "Critical Vendor" context, it essentially means you have to threaten to "cut off" providing goods or services to the debtor.



Does everyone qualify?

- What if I didn't threaten to "cut off" the Debtor?
 - You may still be designated a "Critical Vendor," but it might not be until after the first twenty days of the case have passed.
 - Delays the ability of you to protect yourself before providing post-petition services or goods.
- Even if the Debtor meets the "immediate and irreparable" harm standard to get a "Critical Vendor" motion approved on the first day, it may still be up to the creditor to prove it is really "critical" under the *Mirant Corp.* standards.

What happens at the hearing?

- If you've done your homework, you shouldn't be surprised by the agenda.
- If you have an objection to make, attempt to build consensus with other similarly-situated creditors so you can present a united front.
- Discuss your objection with Debtor's counsel prior to the hearing or even at the hearing—often last-minute language can be inserted into an order, or an agreement reached, that will protect your interests.

Can critical vendors be named later?

- **The "Critical Vendor" Issue After the "First Day" Hearing**
 - What if the Debtor doesn't name who the "Critical Vendors" will be in its "First Day" motion?
 - Will have to show the Debtor you meet the *Mirant* standards
 - Will have to show the Debtor you cannot easily be replaced
 - Delicate balance of acting tough and playing nice at the same time
 - What if the Debtor doesn't get its "Critical Vendor" motion approved on the "first day?"
 - Still have to show you meet *Mirant* standards—just after the first 20 days of the case

Did you sell goods to the debtor?

→ Reclamation Claims

- Allows a vendor to “reclaim” goods sold to a debtor while the debtor was insolvent
- Governed by Section 546(c) of the Bankruptcy Code
- Standards for Reclamation Claims:
 - Seller must make reclamation demand within 45 days of Debtor receiving the goods (on a pre-petition basis); or
 - If the 45 days period expires after the petition date, then seller must make reclamation demand within 20 days after the petition date.

How do you get paid and when?

→ Reclamation Claims, cont.

- Section 546(c) operates differently than traditional state-law reclamation claims under the UCC.
- Reclamation claims are still subject to liens on property, so it may be impossible to get your goods back.
- If you sell perishable goods, reclamation claims may be equally as worthless as when the goods sold are covered by a first-priority lien by a secured lender.

What about administrative claims?

→ The “New” Section 503(b)(9) Claims

- Helps insure you get paid in full for all goods sold to a debtor within 20 days prior to the bankruptcy filing.
- Vendors are given an “administrative expense” claim.
- Provides greater protection than reclamation claims for goods sold within 20 days prior to bankruptcy, as you get paid for the goods, rather than getting them back.

Can I just file a proof of claim for this?

→ **Procedures for Receiving Section 503(b)(9) Treatment**

- Must file a motion for payment of claim as a Section 503(b)(9) claim.
- Some cases set up complex procedures and bar dates for Section 503(b)(9) claims—have your lawyer monitor this carefully.



The good and the bad.

→ **When do I get paid for my Section 503(b)(9) Claim?**

- Even though you get an “administrative expense” claim, you don’t necessarily get paid right when it is allowed.
- Courts are split on when payment is to be made.
- Courts look to three factors:
 - The prejudice to the debtor of requiring immediate payment
 - The hardship to the creditor of postponing payment
 - The potential detriment to other creditors from making an immediate payment



How are courts responding?

→ **Section 503(b)(9) Compromises**

- Debtors will often try to compromise with a creditor to allow a certain amount of Section 503(b)(9) claim, while postponing payment of this claim until later.
- Debtors may attempt to get a creditor to drop their Section 503(b)(9) claim, opting instead to designate them a “critical vendor” (without getting an administrative expense claim) in return for the right to space their payments out over time, or at the end of the case.



What else can I do?

→ Participate on the Creditors' Committee

- The United States Trustee will determine, near the beginning of the case, whether unsecured creditors are interested in forming a committee.
- The Creditors' Committee represents the interests of all unsecured creditors.
- Committee members are not compensated, and their claims are not treated differently, but the Debtor is required to pay for the Committee's counsel.

What would I do on the committee?

→ Choose Committee Counsel

- Beware of law firms that promise the world!!!
 - While aggressive committee counsel is preferred, if a committee is too aggressive it can kill a Chapter 11 case, leaving little recovery for unsecured creditors.
- Look for Firms that Specialize in the Industry the Debtor is in.
- Look for Firms that have a good relationship with Debtor's counsel—amicable compromise will often get unsecured creditors a greater recovery than conflict.

How do I get information?

- What happens if you are not chosen for the Creditors' Committee?
 - You are still entitled to participate in the case.
 - You must pay for your own counsel.
 - If the Creditors' Committee takes action that is not in your best interest, you have the right to object.

What is the goal of chapter 11?

To confirm a Plan or sell assets

- A Disclosure Statement and Plan may be filed on or near the "first day" of the case.
 - May try to underestimate your claim.
 - May try to give you worthless stock for your claim, instead of cash.
 - May give you a promissory note for your claim, rather than cash.
 - May not be feasible, showing conversion to Chapter 7 is possible.

Anything else I can do?

Maintenance Issues Throughout the Case

- If you are given an administrative expense claim, monitor the Debtor's administrative solvency—if the Debtor is administratively insolvent, you won't get paid the full amount you are owed.
- Monitor proof of claim bar dates—file a claim!
- Watch for similarly-situated creditors—teaming up with another creditor when objecting is often less expensive, and also more effective.
- Make sure the Debtor doesn't fall behind on post-petition payment for goods or services provided.
