

# Bankruptcy Checklist

FRANKLIN &  
PROKOPIK  
A PROFESSIONAL CORPORATION  
ATTORNEYS AT LAW

## ENTER AN APPEARANCE

Whenever a bankruptcy touches your business, whether by a vendor or a customer, have an attorney enter an appearance in the case, without delay, so that you remain abreast of developments potentially impacting your interests.

## WHEN THE DEBTOR OWES YOU MONEY

*Stop Collection Activities, Unless an Exception to the Automatic Stay Applies:*

1. Send no further invoices;
2. Make no collection calls;
3. Notify anyone collecting the debt on your behalf, including any attorney, to cease collection activities;
4. Terminate any outstanding garnishments and executions; and
5. If in doubt as to the Stay, consult bankruptcy counsel.

*Certain Collection Activities are Permitted by the Automatic Stay:*

1. Proceedings to determine domestic support obligations;
2. Enforcement of domestic support obligations against wages (but not property of the estate);
3. Acts to continue the perfection of security interests and liens, including judgment renewal and UCC continuation statements;
4. Post-petition perfection of certain statutory liens, e.g. Virginia mechanic's liens. There can be strict deadlines, so do not delay in consulting counsel to evaluate the availability of post-petition lien perfection; and
5. If in doubt as to the Stay, consult bankruptcy counsel.

*Litigation Involving a Bankrupt Party*

1. Send a Notice of Stay to the court, identifying debtor and case number.
2. Litigation can ordinarily continue (at the trial court's discretion) as to non-bankrupt co-defendants, but be aware of the co-debtor Stay of 11 U.S.C. 1301 which applies to certain consumer debts in Chapter 13.

*Filing a Proof of Claim*

1. Determine the type of claim.
  - a) Secured - backed by a lien or security interest in the debtor's property;
  - b) Administrative - entitled to priority, generally available for goods and services provided post-petition, or goods provided within 20 days pre-petition; and
  - c) Unsecured - comes ahead of owners but behind secured and administrative - most trade debt is unsecured.

2. Determine the bar date applicable to the class of claim. The deadline may be set by statute, rule, court order, or there may be none (e.g. in a no-asset Chapter 7 case).

- a) If you miss the bar date, see if you can amend a previously filed 'informal proof of claim,' (e.g. a motion for relief from stay).

3. Attach interest worksheets and documentation of debt (e.g. invoices or contracts) to the claim.

## WHEN YOU ARE HOLDING THE DEBTOR'S PROPERTY

Determine what your rights are in the property and take appropriate measures to safeguard the property.

1. Ascertain whether relinquishing possession will waive your lien (e.g. with a warehouseman's or garage man's lien);
2. If you have no lien in the property pre-petition, determine if you have a post-petition lien or administrative claim for costs of storage or safeguarding; and
3. Contact the debtor or trustee to ascertain its intent with respect to the property and take no action without court approval.

## WHEN YOUR EMPLOYEE FILES FOR BANKRUPTCY

Ascertain the status of any wage garnishments and withholdings from the employee's wages.

1. Continue withholding for:
  - a. Domestic support obligations;
  - b. Health insurance;
  - c. Employee benefits; and
  - d. Taxes.
2. Terminate withholding for:
  - a. Judgment lien garnishments; and
  - b. Repayment of employee loans.
3. Consult bankruptcy counsel if an employee's wages

are being withheld for:

- a. tax liens; or
- b. criminal restitution.

Do not fire an employee because he or she filed for bankruptcy protection.

## DOING BUSINESS WITH A BANKRUPT ENTITY

1. *Ordinary Course of Business Transactions* - A debtor authorized by the court to operate its business is authorized to enter into ordinary business transactions, including the obtaining of unsecured credit (i.e. trade debt) without further order of court.
2. *Outside Ordinary Course Transactions* - A debtor must obtain court approval before using, selling or leasing its property other than in the ordinary course of business. If in doubt, contact bankruptcy counsel.
3. *Executory Contracts and Unexpired Leases*
  - a. Executory contracts are contracts that require future performance by both parties.
  - b. A debtor or Trustee can assume, assign or reject executory contracts and unexpired leases.
  - c. To assume or assign, the debtor must:
    - i. cure all of its defaults;
    - ii. provide adequate assurance of future performance;
    - iii. be able to assign the contract under non-bankruptcy law, without regard to contractual provisions regarding assignment (e.g. not available where performance is unique).
4. *Debtor's Employment of Professionals*
  - a. Employment of attorneys, accountants, appraisers, auctioneers and other professionals must nearly always be approved by the bankruptcy court.
  - b. Court approval of the subject of the engagement is not approval of the professional proposed unless explicitly provided (e.g. approval to auction property is not authorization to employ the auctioneer absent explicit approval).

It is a good practice to contact bankruptcy counsel before conducting business with a debtor or trustee.

## PREFERENTIAL AND FRAUDULENT TRANSFERS

Preferential Transfers are transfers of property of the debtor, made within the 90 days preceding the petition date (1 year in the case of insiders), on account of an antecedent debt (most commonly payment of trade debt).

1. A debtor or trustee can avoid preferential transfers unless:
  - a. The transfer was on account of a transaction in the ordinary course of business (consult bankruptcy

counsel for further explanation)

- b. The transfer was on account of a debt secured by property of the debtor;
- c. The transfer was part of a cash transaction (i.e. no antecedent debt); or
- d. The transferee provided new value to the debtor after receiving the transfer (e.g. shipment of goods or provision of services), provided such new value remained unpaid on the petition date.

Preference avoidance action summonses are served by first class mail, i.e. no personal service. Timelines are short and based on the summons date rather than the service date.

If you were paid by the debtor within 90 days before the filing, you may be a preference target and should preserve all business records involving the debtor to aid in your defense.

## READING THE BANKRUPTCY CODE

Many terms in the bankruptcy code have non-obvious particular meanings developed through case-law. Consult bankruptcy counsel regarding interpretation of the bankruptcy code.