

Business Credit Management Association - Wisconsin **Reclamations – Talking Points**

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Purpose is to get your product back or have your shipment identified as an administrative claim.

A shipment of product to a distressed debtor that technically was insolvent at the time of shipment.

- 1) 45 days (50) prior to the date of the bankruptcy filing
- 2) 15 days (20) prior to the date of the bankruptcy filing

Creditor needs to advise the debtor in writing of your reclamation rights under the bankruptcy laws.

Applies to shipments to the debtor. Shipments to third parties or drop shipments to the debtor's customers messes up a creditors reclamation rights.

Preferences – Talking Points

There is nothing fair and equitable about preferences...

Purpose

To provide equitable and fair treatment to all creditors involved.

Federal Cases

Preference Period

- 1.) 90 days prior to the filing of the bankruptcy petition

Who brings the Action?

-You're being contacted by;
Trustee, Trustee's Attorney, Firms specializing in preference analysis and claims resolution

-What should you know about the above?

Time

2 Years from commencement of a case. 1st Trustee can be appointed at anytime within these two years. Has an additional one (1) year to pursue preference payments.

First Things First....Always Be Ready

Get Organized – Bankruptcy Notification “TO DO” List

-Review: Debtors Account & Transactions

- 1.) **Open Orders**
Immediately stop any & all shipments. Hold orders until they're confirmed by the debtor and or you receive DIP purchase orders or written authorization of pre-petition orders valid post-petition.
- 2.) **Reclamation Review**
Review shipments or sales to debtor in the 45-days (50) prior to the date of filing. (Important – based upon the date of receipt of goods by debtor) File reclamation claim with debtor. Shipments/sales made within 20 days of the filing date, notify debtor of your Automatic Admin claim on those sales /shipments and demand payment.
- 3.) **Preference Payments Received**
Review payments received from the debtor in the 90 days (95) preceding bankruptcy filing. (Important – based upon the date funds cleared the debtors bank account)

Determine Exposure to Potential Preference Claim

-Received payments within 90 days of the bankruptcy filing? Do they exceed \$5,000?

If yes, build file of information contingent upon being contacted for a preference.

Assemble the following:

- a.) Copies of all open invoices
- b.) Copies of last four months debtor's statements of account
- c.) Copy: Checks and remittance advices related to payments received
And all the invoices paid by those checks.
- d.) COD, CIA Payments: Copy checks, purchase orders, invoices, obtain POD's for those invoices/shipments.

If No, b) through d) above, and #4) below do not apply.

- 4.) **Gather**, document and file debtor's payment history
 - a.) Your Company: If your system provides your customer's payment performance, print report (1 to 2 years)
 - b.) Your Industry: Industry credit group reports
 - c.) Worse Case: Refresh or purchase an indirect credit report
- 5.) **File a proof of claim** (always whether it's a 7 or 11 filing).
- 6.) Consider serving on the **Creditors Committee** (Chapter 11 cases).

Defending Preference Claims

The Preference Demand Letter:

- A.) Ignore it and it will go away?
- B.) Don't procrastinate, examine your assembled information and develop clear defenses? Set them out!
- C.) Don't have reasonable defenses? Promptly address the preference demand and negotiate the best possible settlement.

Defenses Available

- 1.) Contemporaneous Exchange
 - The Tight Credit Defense
 - 1.) Funds held on deposit or obtained for immediate or future purchases
 - 2.) CIA
 - 3.) COD
- 2.) New Value
 - Trading Dollars Defense
 - 1.) Post payment delivery for shipments (open account, unpaid invoices)
 - “New Value” can only travel up the stream of payments. (No carryovers)
- 3.) Ordinary Course of Business
 - The most often used defense and most difficult to WIN
 - The Sale/Debt
 - Court looks at: does the business ordinarily buy such goods and does the creditor ordinarily sell such goods
 - The “Transfer”
 - Court looks at: “dealings” between the debtor and creditor
 - a) Payment history calculations and exhibit
 - Calculate for payments within the preference period
 - Go back 2 years, if possible and calculate payment history
 - b.) -Elements of the “Transfer” in Preference Period
 - Show:** Invoice #, Inv date, Inv Amount, check date, invoices paid with the check, # days paid past due date
 - Use/keep backup documents (copies of invoices and checks)
 - c.) What is the best calculation to use?
 - Average Days Approach, Weighted Dollars Days Approach
 - Calculation Methods, how are they different?
 - d.) What does the court look for?
 - Transfer made according to ordinary business terms
 - Growing Majority of courts looking at “industry standards”

Wisconsin Cases – Sec 128

Your Defense – We had no idea the payment we received was preferential!

**Other States have similar abbreviated dissolution Statues.
Determine the appropriate language based on individual state statutes.**

October 2005 Reforms Effective 10/17/2005

- A.) Minimum Threshold to Sue for a Preference
 - \$5,000
 - Minimum preference demand set at \$5000

- B.) Venue
 - Less than \$10,000 suit filed in creditor's venue

- C.) Amending Ordinary Course Defense Exception
 - Ordinary course of business with debtor and industry.
 - **Now one or the other** (not both)

- D.) Extended period for perfection of security interest (UCC's)
 - The recording of a security interest in the preference period gives greater protection for a creditor from a preference challenge

- E.) Expanded Reclamation Time Period.
 - Creditors can now file reclamation claim for goods shipped within 45 days of the receipt of product from the date of bankruptcy filing.

- F.) Automatic Reclamation Claim Rights.
 - Product shipped and received by debtor within 15 days of the bankruptcy filing is given an automatic reclamation status and results in an administrative claim status.

After filing your defenses:

The burden of proof to defeat your logic and defenses is on the Trustee/Trustee's Attorney or company handling the preference claims (outsourced to).

The more difficult you can make it (by still being reasonable) the better your chances of beating the preference call or significantly reducing the amount you may need to pay back!