

Doing Business with Financially-Challenged Businesses

Presented by **Lisa Tancredi and Jeff Tarkenton**
ACC Baltimore

May 20, 2021



Introductions



Lisa Tancredi

Of Counsel, Womble Bond Dickinson

+1 410.545.5810

lisa.tancredi@wbd-us.com



Jeff Tarkenton

Partner, Womble Bond Dickinson

+1 202.857.4450

jeffrey.tarkenton@wbd-us.com

Doing Business with Financially-Challenged Businesses

- When the business is your customer
- When the business is your supplier
- When the business provides services to you

Getting to Yes

Risk management outside of bankruptcy:

- Getting paid/getting what you paid for
- Protecting property rights
- Exiting the relationship
- Enhancing the credit

Doing business with a business in bankruptcy

Payment Terms if You Are the Customer

1. Make payment conditional

- Completion of performance
- Delivery of lien releases
- Pay when paid

2. Advance payments

- Covenants/restrictions on use
- Joint checks
- Security interest in what was purchased

“Show Me the Money!”

Payment terms if *they* are the customer:

1. Hell or high water
2. Shorten trade credit terms
3. Prepayments/COD/accelerated partial payments
4. Deposits, letters of credit, other security
5. Credit insurance

Remedies If They Are the Customer, Upon Insolvency

- Stop goods in transit
- Reclamation

Key question: When does title to goods pass?

“It’s Mine, All Mine!”

- Retain title under state law principles
 - Agency
 - Trust
 - Bailment
 - Consignment
- Monitor location of property
- Provide for access to property
- Special considerations for cash
- Confidential business information

“We Gotta Get Out of This Place”

- Exiting the relationship
 - Certain events of default not enforceable in bankruptcy
 - Limit the term of the contract
 - Termination penalties/limitations of damages
- “Plan B” – benefit of non-exclusive relationship
- Effect of bankruptcy on contract termination

Making it Better – Enhancing Credit

- Guaranty
 - Third party -- bonds/letters of credit
 - Insider guaranty agreements
 - Include guaranty of payments clawed back in bankruptcy
- Retain title until paid in full
- Deposits/collateral
- Purchase money security interests
- Credit insurance

Dealing with a Company in Bankruptcy – Main Types of Bankruptcy Cases

- Chapter 7 – Liquidation
- Chapter 11 – Reorganization
- Chapter 13 – Consumer Reorganization
- Chapter 15 – Ancillary and Cross-Border Cases

What Happens Once a Bankruptcy Petition is Filed

Management

- Debtor-in Possession
or
- Trustee

Automatic Stay

Automatic stay is an injunction that prohibits the commencement or continuation of any judicial, administrative or other action against the debtor or against property of the debtor's estate that could have been commenced before the bankruptcy petition was filed. These include:

- Lawsuits
- The enforcement of pre-petition judgments and any actions to recover obligations that arose pre-petition
- Acts to exercise control over property of the estate
- Acts to perfect or enforce liens
- Setoffs (but not recoupments)
- Need relief from stay to recover collateral

Doing Business with the Debtor

- Does the Debtor have access to cash?
- Does the Cash Collateral budget provide sufficient liquidity to pay post-petition claims?
- Extending Post-Petition Financing.

Getting Paid in Bankruptcy

- Prepetition Claims
 - Proof of Claim deadline
 - Chapter 7
 - Chapter 11
 - Secured Claims
- Priority Claims
- Administrative Claims
- Critical Vendor Claims
- Reclamation Claims
- Post-Petition Claims
- Claims Objections
- Claim Sales

Paying the Debtor - Preferences

The trustee or DIP can recover certain transfers of property of the estate made within 90 days (longer if to an insider) prior to bankruptcy by or for the benefit of the debtor that allows the transferee to receive preferential treatment at the expense of other creditors.

To recover, the trustee or DIP must establish:

- The transfer was made to or for the benefit of a creditor;
- The transfer was for or on account of an antecedent debt owed by the debtor before the transfer was made;
- The transfer was made while the debtor was insolvent;
- The transfer was made within 90 days prior to bankruptcy (or one year for payments to insiders);
- The transfer enabled the creditor to receive more than it would have received had the transfer not been made and the creditor had received a distribution in a Chapter 7 bankruptcy.

Preference defendants' defenses include:

- The transfer was intended to be and was in fact a contemporaneous exchange for new value;
- Made in the ordinary course of business;
- Created a security interest by which the debtor acquired the property that was transferred and the security interest was promptly perfected;
- The transferee made subsequent advances of new value which can be applied to reduce the amount of the preference claim.

Executory Contracts and Leases

- Non-Debtor's Performance Obligations
- Enforceability of *Ipsso Facto* Clauses
- Assumption of Intellectual Property Licenses
- Rejection of Intellectual Property Licenses
- Rejection of Trademark Licenses.

Questions?



Lisa Tancredi

Of Counsel, Womble Bond Dickinson

+1 410.545.5810

lisa.tancredi@wbd-us.com

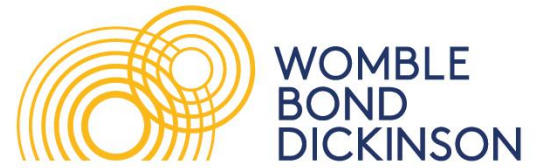


Jeff Tarkenton

Partner, Womble Bond Dickinson

+1 202.857.4450

jeffrey.tarkenton@wbd-us.com



“Womble Bond Dickinson,” the “law firm” or the “firm” refers to the network of member firms of Womble Bond Dickinson (International) Limited, consisting of Womble Bond Dickinson (UK) LLP and Womble Bond Dickinson (US) LLP. Each of Womble Bond Dickinson (UK) LLP and Womble Bond Dickinson (US) LLP is a separate legal entity operating as an independent law firm. Womble Bond Dickinson (International) Limited does not practice law. Please see www.womblebonddickinson.com/us/legal-notices for further details.

Information contained in this document is intended to provide general information about significant legal developments and should not be construed as legal advice on any specific facts and circumstances, nor should they be construed as advertisements for legal services.

