

**Association of Corporate Counsel
South Carolina**

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Columbia, South Carolina

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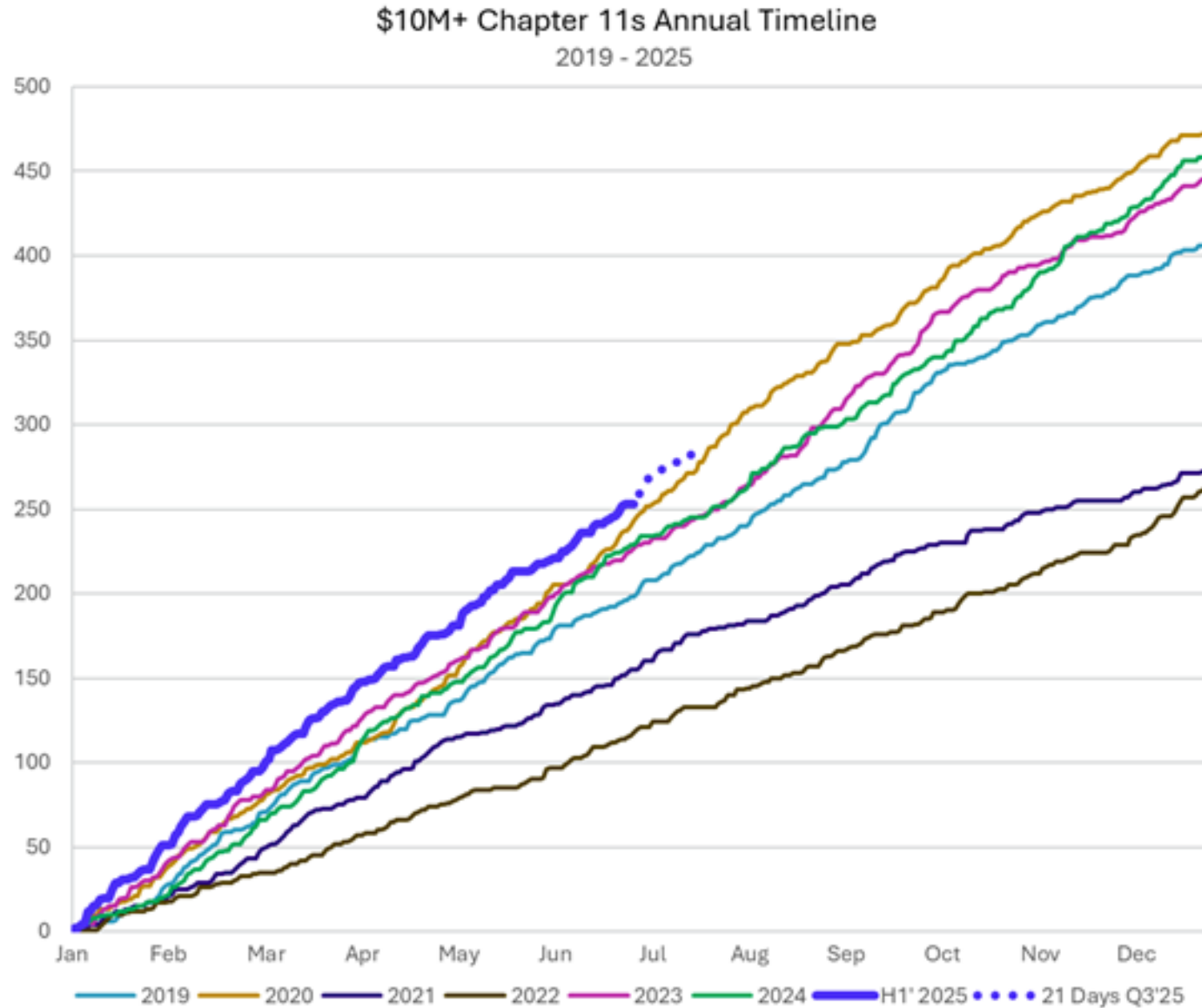
**Strategies and Best Practices for Managing Risk with
Financially Distressed Customers and Supply Chain Partners**

Top Trends and Drivers of Distress

A word cloud illustrating the top trends and drivers of corporate distress. The words are arranged in a circular pattern, with 'Debt Service & Liquidity' being the largest and most central. Other prominent words include 'Inflation & Interest Rates', 'Litigation & Regulation', 'Supply Chain Disruptions', 'Effects of Covid-19', and 'Changing Consumer Behavior'. Smaller words include 'One-Off External Shocks', 'Tariffs & Trade Policy', 'Failed Strategies/Expansions', 'Competition', and 'Corporate Governance'.

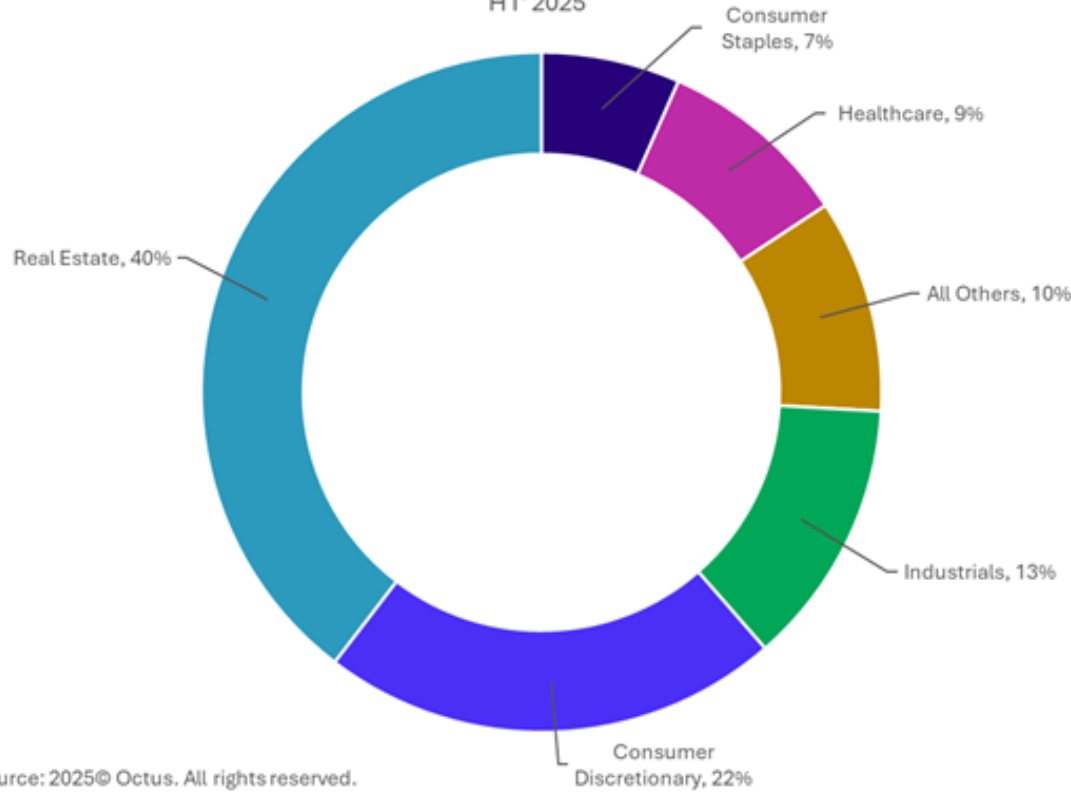
One-Off External Shocks
Tariffs & Trade Policy
Failed Strategies/Expansions
Competition
Corporate Governance
Supply Chain Disruptions
Litigation & Regulation
Inflation & Interest Rates
Debt Service & Liquidity
Effects of Covid-19
Changing Consumer Behavior

Annual Filings:



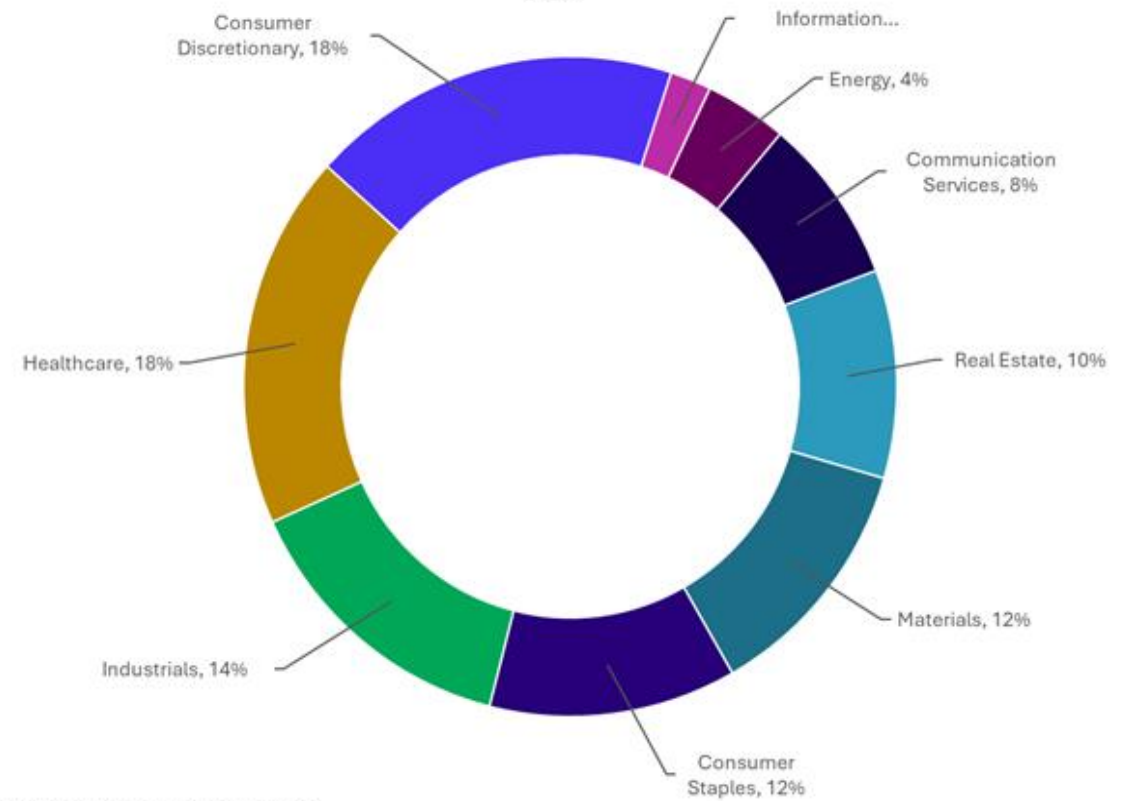
US Recent Bankruptcy Filings by Industry Sector

\$10M - \$100M Chapter 11s by Sector
H1' 2025



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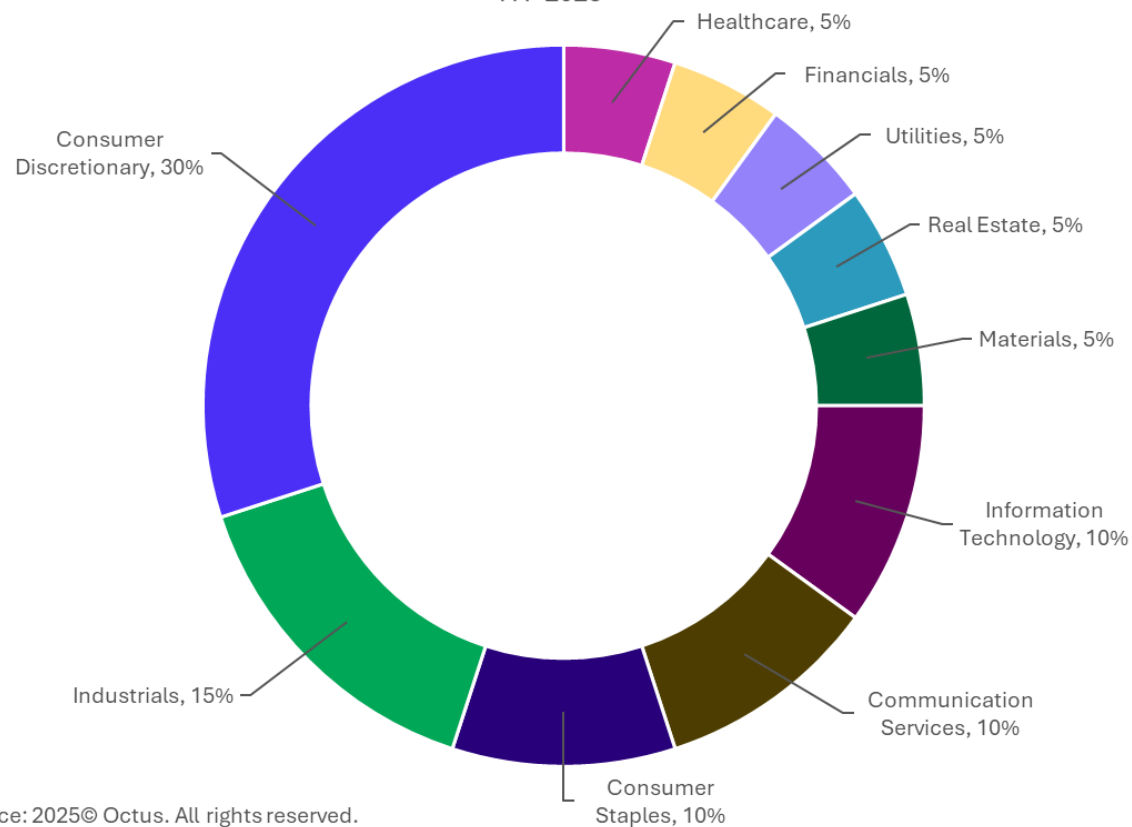
\$100M+ Chapter 11s by Sector
2025



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US Recent Bankruptcy Filings by Industry Sector

\$1B+ Chapter 11s by Sector
H1' 2025



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| Company | Petition Date | Sector | Filing District | Funded Debt | Case Type at Petition | Prearranged? |
|------------------------------|---------------|------------------------|-----------------|---------------------|-----------------------|---------------|
| Ligado Networks | 1/5/25 | Communication Services | Del. | \$8.6B ¹ | Reorganization | Prenegotiated |
| Wolfspeed | 6/30/25 | Information Technology | S.D. Texas | \$6.7B ¹ | Reorganization | Prepackaged |
| Azul S.A. | 5/28/25 | Industrials | S.D. N.Y. | \$6.1B ² | Reorganization | Freefall |
| Marelli Holdings | 6/11/25 | Consumer Discretionary | Del. | \$4.9B | Reorganization | Prenegotiated |
| Rite Aid | 5/5/25 | Consumer Staples | N.J. | \$2.2B | Sale | Freefall |
| Global Clean Energy | 4/16/25 | Consumer Staples | S.D. Texas | \$2.1B | Reorganization | Prepackaged |
| At Home Group | 6/16/25 | Consumer Discretionary | Del. | \$2.0B | Reorganization | Prenegotiated |
| Sunnova Energy | 6/8/25 | Utilities | S.D. Texas | \$2.0B | Sale | Freefall |
| Forever 21 | 3/16/25 | Consumer Discretionary | Del. | \$1.9B | Liquidation & Sale | Prenegotiated |
| Weight Watchers | 5/6/25 | Consumer Discretionary | Del. | \$1.6B | Reorganization | Prepackaged |
| Ascend Performance Materials | 4/21/25 | Materials | S.D. Texas | \$1.5B ³ | Reorganization | Freefall |
| Exela Technologies | 3/3/25 | Industrials | S.D. Texas | \$1.4B ⁴ | Reorganization | Prenegotiated |
| Mitel Networks | 3/9/25 | Information Technology | S.D. Texas | \$1.3B | Reorganization | Prepackaged |
| Everstream Networks | 5/28/25 | Communication Services | S.D. Texas | \$1.1B ¹ | Sale | Freefall |

¹ Includes interest

² Includes \$3B of lease liabilities

³ Excludes \$350M of capital lease and sale leasebacks

⁴ Includes \$385M held by nondebtor affiliates

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Tariffs Taking a Toll at Home

Chapter 11 Filings Citing Tariffs:

1. Balkan Express (Filed: May 2025)

- First Chapter 11 filer to directly cite tariffs as reason for bankruptcy

2. Boundless Broadband LLC (Filed: May 2025)

- Market "turmoil" from tariffs delayed syndication effort

3. Rite Aid Corp. (Filed: May 2025)

- CEO cited tariffs and increased costs from suppliers as reasons for bankruptcy

4. Sunnova Energy International (Filed: June 2025)

- Filed for Chapter 11 bankruptcy, attributing the decision to economic volatility, high interest rates, tariffs, and uncertainty over solar power incentives.

5. Marelli Holdings (Filed: June 2025)

- Filed Chapter 11 due to supply chain disruptions and tariff uncertainties.

6. IG Design Group (Filed: July 2025)

- Noting "tariff induced liquidity" pressure and the "material" total impact of tariffs.

Tariffs Taking a Toll Abroad

Chapter 15 Filings Citing Tariffs:

1. Pelican International Inc. (Filed: March 2025) in South Carolina

- Canadian watersports company was the first filer to attribute its financial problems partly to uncertainty relating to the threat of tariffs by the United States.

2. Sinobec Resources LLC (Filed: May 2025)

- Montreal-based aluminum and steel supplier
- Subject to "full impact of the trade war"
- Impacted by 145% tariffs on Chinese goods entering US


3. GiftCraft Ltd. (Filed: May 2025)

- Canada-based gift items supplier
- Ripskirt brand "significantly" impacted by tariffs
- Primary customer market is US with inventory sourced from China

4. Oak and Fort Company (Filed: June 2025)

- Vancouver-based clothing company

Entering the Zone of Insolvency



Insolvency
Next Exit

Warning Signs and Early Detection:

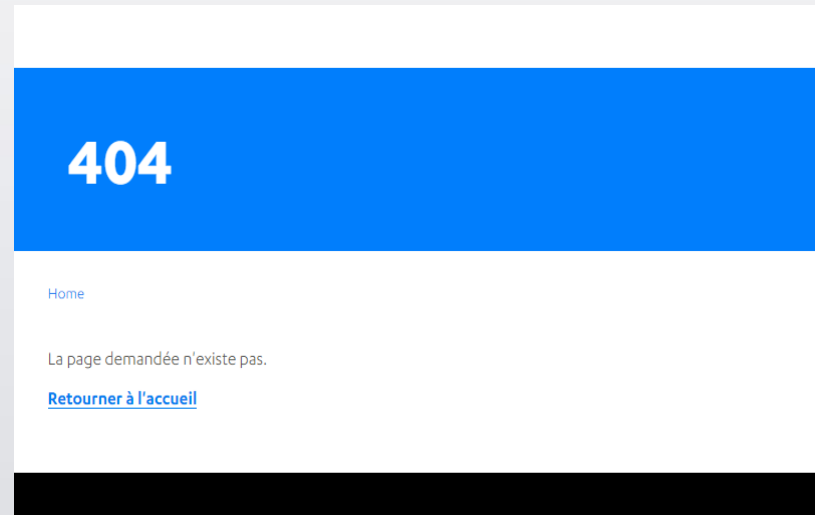
- Payment default
- Requests for accommodations such as changes to credit terms, increases in credit limits
- Fully drawn lines of credit
- Impending maturity dates
- Costly or troubled launches of new products
- Quality and delivery deficiencies
- Loss of customers
- Changes in key management
- Big-ticket litigation
- Retention of financial advisors or insolvency lawyers

Credit Risk Toolkit

- Credit application
- Evaluate/update contracts
- Perfect liens
- Ipso facto clauses
- Non-assignable contracts
- Require collateral or third-party guaranties
- Monitor the counterparty by requiring periodic credit opinions
- Keep accounts current and maintain ordinary billing practices
- Exercise any right to terminate the contract before the Debtor's bankruptcy

Credit Risk Toolkit (Continued)

- Terms and Conditions (That Make a Difference)
 - Attorneys' Fees – Altering Incentives to Litigate
 - Interest Upon Default – Increasing the Cost of Non-Payment
 - .com/termsandconditions



- Demands and Pre-Suit Procedures
- Filing Suit

UCC Remedies

Demand Adequate Assurance of Future Performance

- UCC 2-609. Uniform Commercial Code (UCC) Article 2 (sale of goods).

When reasonable grounds for insecurity exist concerning a party's willingness or ability to perform a future obligation under a contract for goods, Section 2-609 allows a seller of goods to demand written assurances of performance and pending receipt of assurances, suspend the seller's performance obligations.

UCC 2-609 is an effective tool to promote quick communication with customers, in addition to a pause in performance to mitigate risk.

UCC 2-609 may be utilized even if the customer is current in payment.

UCC Remedies

- UCC 2-702(1). Cash before Delivery upon Insolvency.

UCC 2-702(1) allows a seller, upon learning that a customer is insolvent, to ship goods only on a cash before delivery basis, regardless of a contract that provides for credit terms.

- UCC 2-702(2). Reclamation.

Upon learning that a customer received goods on credit while insolvent, a seller may reclaim such goods upon 10-day demand.

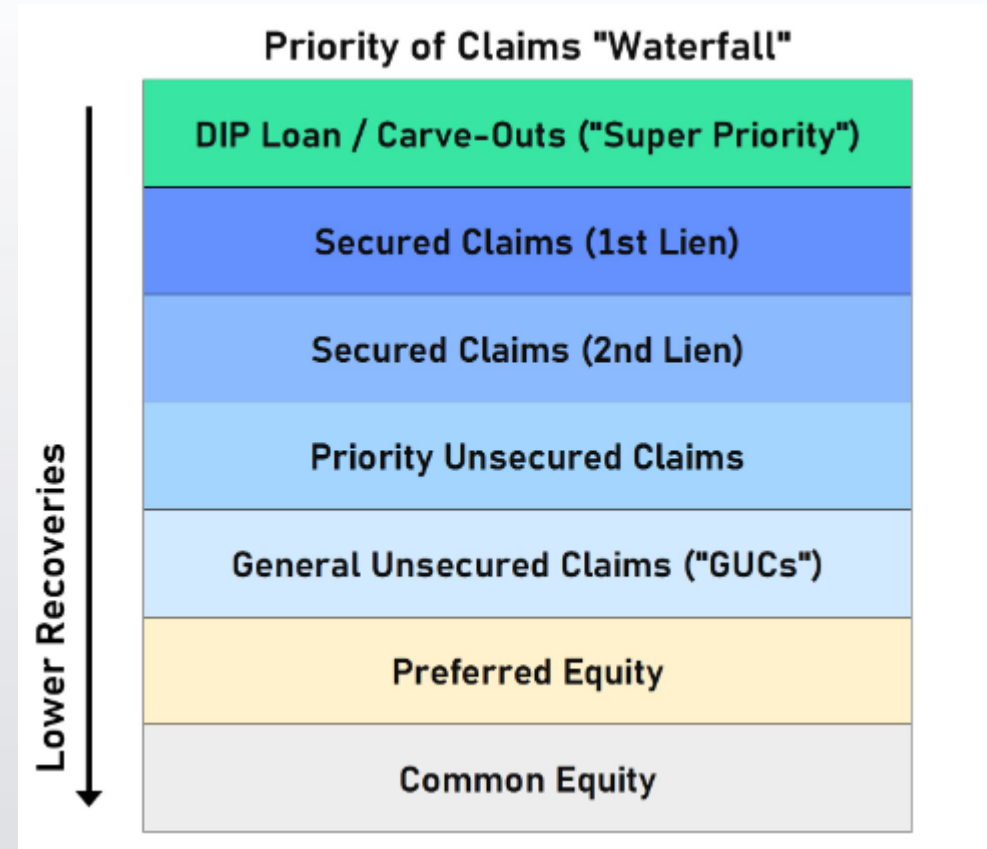
- UCC 2-705. Stoppage of Delivery.

Upon learning of the customer's insolvency, a seller may stop delivery of goods in transit.

'Need to Know' Bankruptcy Concepts and Managing Exposure

I. CLAIM PRIORITIES

- The Bankruptcy Code sets forth clear priorities of payment or entitlement to payment by types of creditors or claims including:
 - Secured creditors, as a result of pre-petition consensual liens on assets and proceeds of assets.
 - Administrative claims, which are the costs associated with the administration of the post-petition bankruptcy estate. These would include purchases of goods and services post-petition as well as professional fees associated with the administration of the bankruptcy estate.
 - General unsecured claims.
 - Equity interests.



II. DOING BUSINESS WITH A CHAPTER 11 DEBTOR

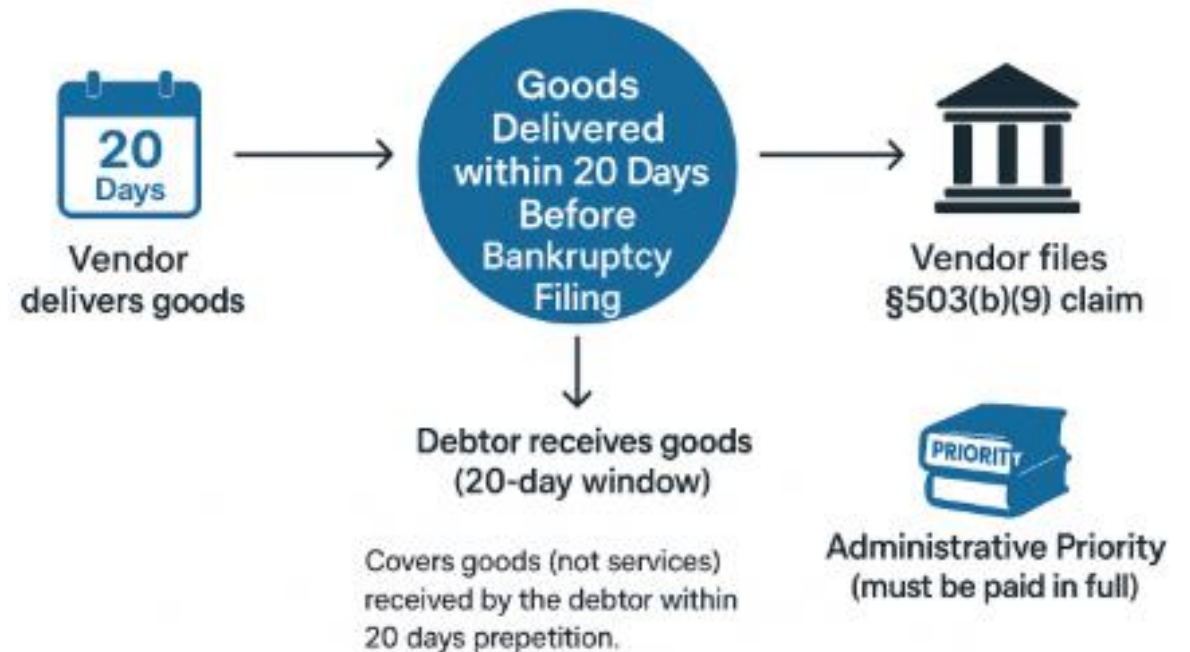
- Upon the filing of a Chapter 11 by a customer, vendors must determine whether to sell to the debtor post-petition.
- To avoid the inherent risk of a Chapter 11, vendors often sell on a cash before delivery or “CBD” basis.
- To remain competitive, vendors are sometimes compelled to extend credit terms to Chapter 11 customers. In this event, creditors should carefully evaluate the risk of non-payment in Chapter 11.
- The Bankruptcy Code treats credit extended to a Chapter 11 debtor in the ordinary course of business as an administrative expense priority claim. As indicated below regarding claim priorities, administrative expense claims enjoy a “high priority” BUT BEWARE OF ADMINISTRATIVE INSOLVENCY (Big Lots example).
- A vendor selling goods to a Chapter 11 debtor on a cash before delivery basis should confirm that the Debtor has authority to use its cash for the purchase. If the Debtor does not have authority to use its cash (pledged to a lender), the Court may order disgorgement.
- In the case of a pre-petition supply contract which provides for credit terms, debtors may assert that such contracts impose an obligation on the vendor to extend credit.

III. CREDITOR REMEDIES

- **20-Day Administrative Claim**

- The 2005 Bankruptcy Code Amendments added Section 503(b)(9) to the Bankruptcy Code which provides that sellers of goods are entitled to an administrative priority claim for the value of goods delivered to a debtor within 20 days prior to the bankruptcy filing.
- The case law addressing Section 503(b)(9) provides some predictability on how this remedy will benefit vendors.
- *True Value* Pitfall

§503(b)(9) 20-Day Goods Claim



III. CREDITOR REMEDIES (Continued)

- **Critical Vendor**

- Critical vendor is a creditor remedy based on a theory that a particular vendor is so essential to a debtor's ability to continue operating that without the uninterrupted flow of the seller's goods, the debtor cannot continue to operate and thus has no realistic chance of a successful reorganization. In these instances, a bankruptcy court has broad authority to order relief that facilitates a successful reorganization.
- Only a debtor can make the determination that a particular vendor is critical and seek court approval of same. A creditor cannot independently impose its critical vendor status on a debtor.
- Vendors who are truly critical to a debtor-customer should continue to seek critical vendor status as a means of getting paid. In doing so, vendors should be careful to not violate the automatic stay by conditioning future business on payment of pre-petition debt. Moreover, vendors should be aware that getting paid as a critical vendor will likely be conditioned on providing normal lines of credit, pricing and terms, or other "customary trade procedures."



III. CREDITOR REMEDIES (Continued)

- **Setoff and Recoupment**



- An often overlooked remedy, setoff arises from the settlement of mutual debts or accounts owed between a debtor and a creditor. Simply, if A owes B \$100 and B owes A \$50, then the debts can be resolved as follows: $\$100 - \$50 = \$50$, so A pays B \$50 and the accounts are settled. The Bankruptcy Code codifies this common law remedy and in fact provides that the creditor has a secured claim to the extent of the value of its setoff claim.
- The debts owing must be owed to and from precisely the same legal entities and the debts must arise either both pre-petition or both post-petition. The debts do not, however, have to arise out of the same transaction.
- The exercise of a setoff remedy requires relief from the automatic stay from the Bankruptcy Court. Moreover, there are somewhat complicated rules regarding exercise of setoff during the 90 days prior to the bankruptcy filing, which if not followed, could result in preference exposure.
- Recoupment is similar to setoff, except that the mutual debts must arise from the same transaction.

IV. EXECUTORY CONTRACTS

- Executory Contract is the Bankruptcy Code term given to a contract between a debtor and a non-debtor party where both parties owe performance to the other. A promissory note would NOT be an executory contract since the holder of the note has no performance obligation. However, a supply contract or other sales agreement would almost always meet the requirements of an executory contract under the Bankruptcy Code. Real estate leases are also treated as executory contracts. The Bankruptcy Code Rules for rejecting executory contracts and leases are debtor-friendly which is precisely why retailers who want to close stores often choose Chapter 11.
- The Bankruptcy Code provides debtors the right to assume or reject executory contracts and leases. If a debtor rejects an executory contract, the non-debtor party receives a general unsecured claim for damages arising from the debtor's "breach" of contract. Thus, a debtor escapes the contract with little cost. On the other hand, the debtor also has the right to assume or assign a contract. In this instance, the Bankruptcy Code requires that the debtor "cure" the contract by paying existing defaults. Presumably, debtors would assume contracts that they deem to be valuable either because they insure an uninterrupted supply of goods or contain favorable pricing or terms. For a creditor who is a party to an executory contract, the assumption of such contract can be an effective vehicle to obtain payment of pre-petition debt.
- Debtors in Chapter 11 must assume an executory contract before or in conjunction with the confirmation of the Chapter 11 Plan. The non-debtor party to the contract can ask the court to set a shorter time if it will be harmed by the delay in the debtor's decision.
- The Bankruptcy Code requires that the non-debtor party to an executory contract continue to perform its obligations under the contract pending the debtor's decision to assume or reject such contract, and provided that the debtor is in fact performing its obligations of the contract post-petition.
- A supply agreement impacts a creditor's rights as a critical vendor since the leverage of not shipping is arguably eliminated in the context of an executory contract.

V. AVOIDANCE ACTIONS

- **Fraudulent Transfers**

- Fraudulent transfers is a partial misnomer because fraud is not required. The debtor can recover payments made to non-insiders for transfers occurring within one (1) year prior to bankruptcy and for two (2) years with respect to insiders. The debtor can recover transfers that were made in an attempt to defraud creditors but also when the transfer was simply for "less than reasonably equivalent value".
- A statute of limitations on asserting fraudulent transfer claims is two (2) years from the petition date.
- Debtors and trustees in bankruptcy are also entitled to assert claims under state law fraudulent transfer statutes which are similar to the Bankruptcy Code's fraudulent transfer statute but often have a longer statute of limitations, and the reach back period may be longer.



V. AVOIDANCE ACTIONS (Continued)

- **Preferences**

- Bankruptcy Code Section 547 allows the debtor to recover pre-petition payments to third parties that were made within 90 days prior to filing as to non-insiders and within one (1) year prior to filing with respect to insiders. The requirements to assert a preference are that the payment in question be made within the appropriate time period, made while the debtor is insolvent, the payment is on account of antecedent debt and the payment allows the creditor to receive more than it would in a Chapter 7 liquidation. Debtors or trustees pursuing preference claims rarely have difficulty establishing these basic requirements.
- The statute of limitations on preference actions is two (2) years from the petition date.
- Creditors who have received allegedly preferential payments have several defenses.
The most common defenses are:
 - That the Payment was made in the ordinary course of business**
 - That the Creditor provided subsequent new value after the payment at issue**
 - That the Payment constituted a contemporaneous exchange for value**
- **Landmark Preference Decision *Auriga Polymers, Inc.***

Thank you for your attendance.

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