

## Best Practices for Addressing Troubled Customers



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## Dealing With a Distressed Customer Outside of Bankruptcy



- Distress in auto supply is increasing due to a variety of factors
- Sometimes the distressed customer is obvious due to media reports, but many times that's not the case
- Watch for indicators of distress
  - Payments not timely or later than course of dealing
    - Over 10 years of a great economy has lulled many
  - Request financials if allowed under contract
    - Actually read the financials you've been given!
  - D&B is sometimes helpful, but many times not
  - Publicly traded company? Check the SEC filings
  - Leadership changes, sales of business units/facilities
  - Industry intel

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## What To Do If Your Customer Is Late



- Supplier does not need to sit idly by and wait for customer to file for bankruptcy
  - 2-609 letter to customer seeking adequate assurance may be an option
    - Downside:
      - potential preference liability/litigation
      - need to weigh risks of payment now vs potential disgorgement later
    - Upside:
      - may change payment terms;
      - may shorten contract which has potential positive consequences, especially if bankruptcy is filed thereafter and if you're a sole source supplier
    - Be careful with this option, letter must be carefully drafted; must rely on facts not hunch, but don't be afraid to send it if you've done your due diligence

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## Additional Thoughts



- What are your lien options? Stay tuned...
- Build a set of facts, then consult with counsel for further intel on your customer or industry



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## Dealing With Distressed Customer in Bankruptcy



How am I going to get paid?

- Unpaid prepetition deliveries
- Post-petition deliveries

Bankruptcy Code strives for equal treatment of all creditors in the same class:

- Reality is all suppliers are not treated equally
- Up to supplier to take advantage of Bankruptcy Code sections that allow for special treatment, if allowed by facts and circumstances

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## Asserting a Secured Claim



Are you entitled to a secured claim?

- PMSI
- Statutory non-possessory liens like tooling and mold liens (again, stay tuned...)
- Possessory liens



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## Asserting an Administrative Claim



- Administrative claims under the Bankruptcy Code are a special category of claims entitled to priority under certain circumstances
  - Covers products delivered post-petition
  - Also includes 503(b)(9) claims for delivery of product within 20 days of bankruptcy petition
  - Must assert in order to receive this priority
  - Differing treatment under confirmed plan vs sale of business – why?

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## Administrative Claims (continued)



- When do 503(b)(9) claims get paid?
- 503(b)(9) payment process may be streamlined via a court order...or not
- Different than a proof of claim
- You may be leaving money on the table

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## Asserting Reclamation Claims

- Supplier can request reclamation of goods shipped within 45 days prior to bankruptcy petition
  - Timing of reclamation claim is important — 45/20 rule
  - Reclamation rights are subject to bank liens
  - Have parts been incorporated into larger component?

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## Importance of Executory Contracts

- Executory contracts are contracts where both parties have duties to perform
- Special status under Bankruptcy Code
- Many supply contracts and purchase orders are executory contracts
- Sole source suppliers may have significant leverage where resourcing is difficult

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## Executory Contracts (continued)

- Supplier must ship post-petition unless supply contract terminated pre-petition
- If no executory contract at petition date, no obligation to continue to ship, give credit terms or agree to pricing
- If executory contract, Debtor decides whether to assume or reject supply contract, both result in consequences

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## Executory Contracts (continued)

- If executory contract assumed, Debtor must cure pre and post-petition arrears
  - Cleanses preference liability
  - Timing of assumption/rejection can vary greatly
  - While deciding, Debtor must pay post-petition



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## Executory Contracts (continued)

- Look at expiration of executory contracts and compare to continued need for parts
- May be opportunities for supplier leverage
- Put the brakes on new contract acceptance process: stop and think
- Contact counsel for strategies to optimize leverage under these facts and circumstances

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## Executory Contracts (continued)

- Potential for similar leverage in context of sale of Debtor's business because of requirements to assign executory contracts
- Typically a process in place to assume and assign contracts in a BK sale scenario

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## Critical Vendor Status

- Some bankruptcies allow for critical vendors to get paid ahead of unsecured creditors
- Critical Vendor motions typically include a list of proposed critical or sole source suppliers
- Critical vendors may get prepetition debt paid or an administrative claim in exchange for credit terms and/or continued supply during bankruptcy case
- Attractive, but pitfalls exist, so contact counsel

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## Rozanne M. Giunta

Over 40 years experience in:

- ◆ Bankruptcy, loan workouts, preference claims defense, collection suits, foreclosure actions
- ◆ Automotive, manufacturing, health care industries
- ◆ Representing banks, secured lenders and unsecured creditor committees

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## Dennis W. Loughlin

Over 23 years experience in:

- ◆ Corporate counsel in the automotive supply chain with expertise in distressed auto supply and tooling industries
- ◆ Counseling secured and unsecured creditors in all phases of commercial disputes both in and outside of bankruptcy

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## Susan M. Cook

40 years of experience in:

- ◆ Bankruptcy, business reorganization
- ◆ Represents clients in distressed automotive supply chain
- ◆ Commercial and business law

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# Q&A

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## Conclusion



Thank you!

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