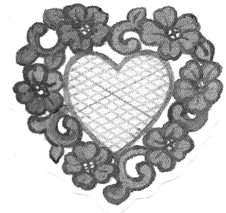




*Happy Valentine's Day*

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## *"Tip of the Month"*

### **Bankruptcy Preference Actions – Getting Sued for Getting Paid**

That delinquent debtor is always way past due to pay on account with your business. The big check finally comes in, to your relief. Next you hear the debtor has filed bankruptcy. Oh well. Next you get the demand letter from the bankruptcy trustee: Give back that preference payment the debtor sent you, or get sued in a far away court.

To prove that the debtor's payment to you was preferential, the trustee only needs to show that the payment was made:

1. within 90 days of a bankruptcy filing;
2. for an antecedent (old) debt;
3. when the debtor was insolvent; and
4. the vendor received a larger payment than it would in bankruptcy.

It is very easy to establish these elements, and the bankruptcy trustees frequently demand the return of all payments made within 90 days without first checking all the facts. If you find yourself being asked to return payment by a bankruptcy trustee, you may have some defenses. These are the two most common:

1. Payment was made in the "ordinary course of business." This means payment was consistent with industry practice or with your history with the customer. If the customer always took a while to pay but was regular in making payment, this defense might work.
2. "New value" was given. If you provided goods or services after the preference payment was made, and the new invoice is outstanding, the new invoice can offset the payment you are asked to return.

Prevention is better than cure. If possible, try to get your slow-paying customer to pay in advance or C.O.D. These payments are not recoverable in bankruptcy because they are made for future or current debt, not antecedent debt. If you know your debtor is in trouble, try to get the payment from a third party, like a parent or subsidiary of the debtor, or an affiliated company or a lender. Third party payments are not preferential because they do not involve the customer's assets. Try to get personal guarantees from the debtor's principals. Try to get your debtor to give collateral as security. Or, consider taking just \$4,999 in payment during any 90-day period on an overdue account. Under bankruptcy law, aggregate payments under \$5,000 are protected.

In these tough times, overdue accounts and bankruptcy filings are ever more common. To make sure you get the payment you have worked hard for, take action now to protect yourself.

If you have questions about a debtor's bankruptcy might affect your business operations, give us a call at 668-1971 or contact us by e-mail at *mailbox @ biz-patlaw.com*.

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