



ATTORNEYS AT LAW

“Protecting your Trucking & Logistics Companies when a Customer files for Bankruptcy Protection”

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Becker LLC Real Estate and Logistics Practice Leader Anthony J. Vizzoni interviewed Eric Perkins and Justin Baumgartner of Becker LLC’s Bankruptcy Team to discuss how the recent uptick in bankruptcy filings could impact the trucking and logistics company owners.

Vizzoni: The Becker Trucking & Logistics Practice Group is starting to see more volume with bankruptcy filings affecting our clients’ ability to get paid for their services, whether on the trucking end of the business or in the warehousing services. For example, Party City recently filed for Chapter 11 bankruptcy which, as you know, is a reorganization of the debtor as Party City continues to operate in bankruptcy. Can you advise what a trucking or logistics company should do once they receive notice of a customer having filed for bankruptcy?

Perkins and Baumgartner: Once a company gets notice, through any means, they should contact a bankruptcy attorney. This may sound self-serving, but the first few days and weeks of a bankruptcy filing can be critical with numerous deadlines that can shift based on court orders obtained by debtors often with limited notice to creditors. During the first days of a bankruptcy filing, creditors may also have the opportunity to participate on a Creditors’ Committee. A Creditors’ Committee is formed at the recommendation and under the direction of the Office of the United States Trustee, which is a component of the United States Department of Justice. The US Trustee’s job is to act as a government watchdog over all aspects of bankruptcy filings.

A Creditors’ Committee consists of the largest unsecured creditors in a case and is charged with advocating for the general unsecured creditors, in the hopes of getting them the largest possible recovery on their claims. As a result, it is imperative that a company with a monetary claim against a bankrupt debtor file an

appropriate proof of claim in the case. A proof of claim will not only provide proof of the amount of the claim, but also the statutory basis for the claim under the Bankruptcy Code. Failure to file a proof of claim could result in a company receiving nothing from any distribution from the debtor to unsecured creditors in the case. Therefore, in addition to contacting bankruptcy counsel to help navigate the Bankruptcy Code and the filing, a company should be assembling and cataloguing by date all outstanding invoices in order to be ready to prepare and file its proof of claim.

Vizzoni: What if your trucking or logistics company was recently paid by a customer right before that customer files for bankruptcy? Should those companies that have been paid still be concerned?

Perkins and Baumgartner: Yes the company, even if paid in full by the debtor before the bankruptcy filing date, should be concerned. Under the Bankruptcy Code, there is the well know 90 day pre-petition preference or claw back period. This means any payments received by the company from a debtor customer within the 90 day prior to the filing of the petition is subject to scrutiny and a possible claim to be clawed back by the debtor or an entity authorized by the Court to do so. There are multiple defenses to these claw backs, each of which have to be analyzed in the context of the relationship between the company and the debtor. The best thing to do to have those defenses available is to not let a company's customers extend their payment terms. This is often a sign of trouble. At the first sign of a request to extend time on payment terms, or worse, a customer starts to slow pay without explanation, companies should view this as a red flag and deal with it immediately.

Vizzoni: Similar to the shipping of goods by the trucking company, our firm also has clients that are in possession of stored goods for their customers, which customers have filed for bankruptcy while the goods are still in the possessions of our clients. In those cases, can our clients exercise a warehouse lien on the goods? And if so, what effect does the bankruptcy filing have?

Perkins and Baumgartner: The exercise and perfection of a warehouseman lien on goods held for storage after a bankruptcy filing depends on each particular state. Many state statutes afford warehousemen liens where the goods are stored. Usually, the mere possession of the goods in the warehouse perfects that lien and there is no need to file a UCC financing statement. As a result, the warehouseman is a secured creditor and, notwithstanding the bankruptcy filing, a warehouseman can continue to hold the stored goods absent a Bankruptcy Court Order to release same. Also, keep in mind that many lenders require landlord waivers as to liens on goods financed by the lenders and stored by the

warehouseman. To the extent that the warehouse provider has entered into any agreement with their customers' lenders, this will certainly have an impact on the ability to exercise warehousemen liens. With the assistance of bankruptcy counsel, secured creditors can assert a certain amount of leverage on their customers, and potentially the bankruptcy debtor, which will result in the warehouse servicer getting paid.

Vizzoni: What if the debtor is attempting to reorganize its finances under Chapter 11, such as with the Party City filing? While the debtor continues to operate in a Chapter 11 bankruptcy, the debtor will need vendors to ship their goods and keep the supply chain flowing for their operations. How do trucking and logistics companies protect themselves as to payment when their customer is already in bankruptcy?

Perkins and Baumgartner: Any post-petition services are classified as administrative expenses and should be paid before any of the pre-petition creditors, provided that any lenders agree to allow those payments through a cash collateral agreement with the debtor that is approved by a Bankruptcy Court Order. Such an agreement and Court Order will allow a debtor to pay ongoing operating bills in the Chapter 11. Even within that context, there can always be concern about being paid, so a trucking company can weigh whether the company wants to continue to provide the services, and/or insist on strict payment terms, even going so far as demanding cash on demand (C.O.D.) payments. Sometimes it is hard to predict how and/or where a case is going. Again, a seasoned bankruptcy attorney can provide direction.

Vizzoni: What advice would you give our clients as to protecting themselves in a declining market where the risk of customer bankruptcy may be elevated?

Perkins and Baumgartner: In times like these, knowing your customers and keeping a close watch on the payment of invoices is key, no matter how good a relationship the company may have with its customer. Any sign of payments slowing down or requests for an extension of payment terms is reason for extreme caution. Rumors can also be helpful. At the first sign that payment may be late or otherwise delinquent, immediate action should be taken. To the extent there are written agreements with customers, a company should review those agreements to make sure they are fully signed and current, and determine what remedies exist in the event of a breach. Failure to make payment within the terms of the contract is a breach and the trucking or logistics company should not hesitate in exercising its rights under the contract, which usually forces a dialogue with the customer. In that dialogue, it is entirely appropriate to ask for additional assurances for payment. Those assurances can take a number of forms, such as

personal guarantees or corporate guarantees from other affiliated or parent company of the customer.

Keeping in mind that customers generally have lenders who have collateralized their loans with all of the company's assets, and sometimes even personal guarantees, with some effort, our clients can usually determine the extent of the trouble that their customers may be in and then evaluate what to do next. Our clients should also remember that often times their customers' financing involves asset based lending and if the customers are themselves having trouble collecting on their receivables, the customer is losing part of their base for lending, which could be a downward spiral leading to a bankruptcy event.

In sum, this is not the time to be complacent. A trucking or logistics company taking affirmative steps to recover any debts owed to it prior to a bankruptcy filing usually results in additional leverage that can be used against the debtor if and when the debtor files for bankruptcy protection, thereby enhancing the trucking or logistic company's ability to collect on the debt it is owed.

About Becker LLC

Becker LLC is a premiere mid-market firm recognized as a leader in the Trucking and Logistics Industries. With offices in New York, California, Pennsylvania, and New Jersey, the firm provides forward-thinking, mission-critical advice to T&L industry entrepreneurs and management on high stakes, complex legal matters, as well as day-to-day matters and long-term plans.

The firm is proud to be a member of the following Trucking and Logistics Associations: Truckload Carriers Association, Association of Bi-State Motor Carriers, Traffic Club of New York, New Jersey Motor Truck Association and the NYNJ Foreign Freight Forwarders & Brokers Association. For more information, call (973) 422-1100 or visit us on the web: <https://www.truckingandlogisticsatbecker.legal/>

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