

Selling on credit

Five tips every businesswoman should know



By Lisa Sumner, partner,
Poyner & Spruill LLP

Tip 1: Credit enhancements should be considered with financially unstable customers.

Certain tools are available to add security and save a deal for those concerned with a customer's ability to pay on credit. Having a guarantee from the principal of the debtor's entity or from an affiliated business entity not only provides another source of recovery, but also can ensure that any debt receives priority treatment. When obtaining a guarantee, include language specifying that it is a guarantee of payment — not of collection — and consider requiring the guarantor to secure the guarantee with a security interest in property owned by the guaranteeing party. It also is advisable to request a letter of credit from a financial institution to protect the payment. It is far easier to obtain a guarantee or letter of credit at the outset, when debtors are confident that they will perform.

Tip 2: Taking a guarantee from a spouse can cost you.

Not all guarantees are created equal. If credit is extended to a business and you require a guarantee from a company's principal and his or her spouse — who is not active in the business — the federal Equal Credit Opportunity Act (ECOA) not only can interfere with the ability to collect from the non-business spouse, but also can result in thousands in affirmative sanctions. ECOA's purpose is to ensure that businesses engaged in extending credit do so on a fair and impartial basis, without discrimination on the basis of sex or marital sta-

tus. All forms of consumer and business credit are potentially affected by it.

Tip 3: A payment received is not always a payment kept.

If a customer makes a payment on a credit account and then files a bankruptcy petition within 90 days after making a payment, the payment can be recovered as a "preference" under the federal Bankruptcy Code. Its goal is to make the ultimate distribution to a debtor's creditors fairer by bringing out-of-the-ordinary payments made within a 90-day period back into the bankruptcy estate for redistribution to creditors on a pro-rata basis. This can prevent a situation in which some unsecured creditors are paid in full before bankruptcy, while others receive no payment. However, defending against a preference demand or complaint can require a detailed analysis of statutory defenses. Never conclude that there is no defense to a preference claim without first checking with experienced bankruptcy counsel.

Tip 4: If credit sales were made to a company that has declared bankruptcy, act quickly.

When a business debtor files a Chapter 11 bankruptcy case, its suppliers are entitled to an administrative claim equal to the value of any goods received by the debtor in the ordinary course of its business within 20 days before the bankruptcy petition date. If a debtor wants to confirm a Chapter 11 plan to reorganize, it must pay all administrative claims in full, or obtain the consent of each administrative claimant to a lesser amount. This can be a valuable claim to a supplier, but it's important to act promptly after the bankruptcy filing

by consulting legal counsel and filing a request for payment of the administrative claim. Also ask about potential rights to reclaim goods sold prior to the bankruptcy.

Tip 5: Filing a proof of claim is an easy way to preserve your rights.

Most individuals who file a bankruptcy petition do so under Chapter 7 or 13 of the Bankruptcy Code. Most Chapter 7 cases are designated as no-asset cases because there are no assets for distribution to creditors. In such cases, filing a proof of claim is not necessary. However, if the trustee discovers sufficient assets to render a Chapter 7 case as an asset case — and in all Chapter 13 cases — it is necessary for creditors to file a proof of claim to participate in distributions. In Chapter 11 cases — which primarily are used by businesses to reorganize finances or conduct an orderly liquidation — a creditor whose claim is listed by the debtor as "disputed, contingent, or unliquidated" must file a proof of claim. In the Eastern and Western Districts of the U.S. Bankruptcy Court in North Carolina, proofs of claim can be submitted electronically using instructions found on each court's Web site. In the Middle District, claims continue to be submitted by mail. ■■■

Lisa Sumner is a partner in the Raleigh office of Poyner & Spruill LLP, where she practices in the areas of bankruptcy, creditors' rights, and commercial litigation. She is licensed to practice law in North Carolina, South Carolina and Virginia, and can be reached at (919) 783-2869 or via e-mail at lsumner@poynerspruill.com. To register for the firm's in-depth alerts on credit-related issues, visit www.poynerspruill.com.