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Chapter 8 Humor

BY SCOTT K. BROWN

Don't Hate Me for Being Critical

Critical Thoughts about Critical Vendors

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I remember well the days when the propriety of critical-vendor motions was debated endlessly and intensely, as though the balance of the world depended on it. Who could blame our profession? "Critical vendors" are, by their very own definition, critical. And when something is critical, we all want to learn about it — especially when it entails "getting paid more (sooner)" in bankruptcy.

Even well-educated clients who were not bankruptcy professionals knew and understood the importance of being a critical vendor. Typically educated by a desperate debtor, they learned that if they were "critical," they could be paid in full without slogging through the uncertainties of a messy bankruptcy. The news may have been so convincing that they continued to extend credit to the debtor after it filed for bankruptcy. Naturally, they called you to make sure they got on "that" list.

Yes, we were all living the good life. Debtors were paying creditors. Creditors were getting paid. Attorneys looked smart and worth every dollar they billed.

But then someone spoiled it.[1] The "uncritical" vendors tend to be the ones blamed (*i.e.*, the vendors that the debtor doesn't really need — the vendors who spat on the debtor as it charged toward bankruptcy or just didn't care). Well, they didn't care until the "critical" vendors got preferred and paid at the beginning of the case — then they furiously fought back. Before you knew it, courts were denying the love to all but the "very most" critical vendors.[2]

Some might argue that the debtors ruined it. They might have been trying to do too many favors for too many creditors and thereby rushed to judgment and designated a few uncritical vendors as "critical." Such posturing created suspicion among the undisputed uncritical vendors and caught the attention of a few bankruptcy judges, who started creating "tests" to catch the fraudsters.[3]

A small group of people blame the lawyers (there may be some truth to this rumor). No one likes to tell their debtor/client that it cannot pay its important vendors once it files for bankruptcy, potentially accelerating a struggling company's woes into, "Whoa, how did this thing get sideways so quickly?" I can almost hear the lawyer's voice say this on one of the first calls with the new debtor/client: "Well, there is this thing called a critical-vendor motion...."

No one blames the courts or the U.S. Trustee's office (that is like blaming the police for crime). To their credit, they never say there are never any critical vendors, just that debtors (or critical vendors (or attorneys)) were being too greedy and overstating who was really critical. For some reason, it takes some time for a debtor to build credibility, notwithstanding all of those declarations filed under oath at the beginning of a case.

All of this is a long way of saying that I was surprised when, not too long ago, a creditor in a chapter 11 case called and asked me to represent it. It was an unsecured creditor. In addition, this creditor had been told there was a "critical vendor list" and it was going to get paid if it agreed to give the debtor its "terms" during the bankruptcy case.

Skeptical (since I hadn't seen a chapter 11 case in years, much less a critical-vendor motion), I investigated. Much to my surprise, I found a skillfully drafted critical-vendor motion sitting on the docket identifying only the "very most" critical vendors. But before the ink from the PACER stamp was dry, I also found an objection to the critical-vendor motion challenging the "very most" designations.

1 *In re Kmart Corp.*, 359 F.3d 866 (7th Cir. 2004).
2 *Id.*; *see, e.g., In re New Publ'g Co.*, 488 B.R. 241 (Bankr. N.D. Ga. 2013).
3 This is probably a good place to drop a footnote advising the reader that I am not going for precise historical accuracy in this article. The "tests" have always existed in one form or another, so please *do not* cite it in your next critical-vendor motion.

Thus positioned, I found myself having to represent a client that I barely knew with the help of a debtor that I knew even less about from attacks of parties who were groping in the dark and knew less than I. I learned (or relearned) that most courts require three things to designate true and honest (very) critical vendors: (1) the payments of pre-petition debt must be necessary for the debtor's reorganization; (2) the vendor must refuse to provide service without a critical payment; and (3) the uncritical vendors must not be prejudiced by the payment.

Necessary

Because it is not enough to say a payment must be "necessary" for the debtor's reorganization, some people characterize this test as the "doctrine of necessity." Adding the word "doctrine" to the mix is just a fancy-sounding way to highlight the criticalness of critical vendors and the motions that seek to pay them.[4] At its most basic level, the "doctrine of necessity" is people just trying to convince a judge (or any objecting parties) that a vendor must be paid some or all of its claim or the debtor will not survive another day in bankruptcy, let alone the six to 18 months that is needed to reorganize.

Refusal

This test creates an interesting dilemma. Some nefarious critical vendors will refuse to provide goods or services — if that is required to get paid. Can you blame them? If you knew you were going to win the lottery as long as you bought a ticket, what would you do? This is why the critical vendor was not on my "list of people to blame" above; to be even considered critical, they have to demonstrate a high level of self-interest and be demanding. It's a self-fulfilling (if not self-serving) prophecy.

Prejudice

"Prejudice" has two definitions, according to my reliable Google search. First, it is a "preconceived opinion that is not based on reason or actual experience." Second, it is "harm or injury that results or may result from some action or judgment." Either could apply here. I personally think that courts should focus on "envy," not "prejudice" (Google's definition of "envy": "A feeling of discontented or resentful longing aroused by someone else's possessions, qualities, or luck.") This test should require the objecting party to testify under oath as to why they insist on "downing another quart of pickle juice every time anyone around [them] has a happy moment."[5]

Conclusion

In the end, my client passed the "very most" smell test, while other "very most" critical vendors were weighed in the balance and found wanting. It should be noted that despite advancing to a state of anticipated nirvana, my client still only received a partial payment. Then it received the news that such a designation (though partial) disqualified it from serving on the unsecured creditors' committee. Really? Another quart of pickle juice? I feel another column surfacing.... abi

4 The Seventh Circuit was not intimidated by the following phrase: "A 'doctrine of necessity' is just a fancy name for a power to depart from the Code." *Kmart*, 359 F.3d at 871.

5 Quote attributable to Jeffrey R. Holland, *available at* pinterest.com/pin/238620480227854966.

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