



# Mission Critical (Vendor): Should You Choose to Accept It

**Monday, October 27, 2025**  
**3:15pm – 4:00pm**

CRF October Forum  
Marriott Harbor Beach Resort & Spa in Fort Lauderdale, FL



# *Subject Matter Experts*

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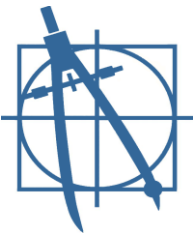


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# *Mission Briefing: What is Critical Vendor Treatment?*



# I ONE MINUTE BANKRUPTCY 101



- **A chapter 11 debtor generally continues to operate its business and manage its assets in bankruptcy, but must adhere to the provisions of the Bankruptcy Code and often must obtain bankruptcy court approval to use estate assets**
- Creditor recoveries are subject to the priority scheme of the Bankruptcy Code
  - Administrative expense claims, e.g.:
    - Claims for goods sold post-petition
      - § 503(b)(9) – Claims for goods sold in the 20 days before the filing
  - General unsecured claims, e.g.:
    - Claims for goods sold prepetition

# I CRITICAL VENDOR PROGRAMS: THE CONCEPT



- Debtor seeks court authority to pay “critical” vendors’ prepetition claims outside the priority scheme of the Bankruptcy Code to prevent potential disruption to the business and Chapter 11 objectives caused by vendors’ refusal to sell on credit post-petition
  - Exception to claims priority rules
  - Frequently focused on 503(b)(9) claims, lien rights, and foreign vendors – particularly whether claim theoretically must be paid in full to confirm a plan in any event
- ***There is no Bankruptcy Code provision that expressly authorizes “critical vendor” treatment***
  - Court-created, based on the “doctrine of necessity”
  - Section 363(b) – use of property of the estate outside ordinary course of business
  - Section 105(a) – catch-all; permits court to “issue any order, process or judgment that is necessary or appropriate”

# I CRITICAL VENDOR PROGRAMS: THE PROCESS

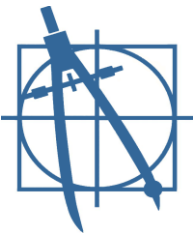


- How is a critical vendor program implemented?
  - Debtor files motion for bankruptcy court's approval
    - Some courts prohibit preferred critical vendor status
    - Among those courts allowing critical vendor status, some are stricter than others
    - Routinely approved in certain of the more prominent districts for large, complex Chapter 11 filings
  - Debtor typically seeks entry of an interim order, followed by a final order
- Who is a “critical vendor”?
  - Debtor typically has broad discretion in identifying critical vendors
    - But, may need consent of others (e.g., lenders, creditors' committee)
    - A vendor is less likely to be deemed critical if it is obligated to continue selling to Debtor via pending supply contract
  - Identity of critical vendors is usually non-public!

# I CRITICAL VENDOR PROGRAMS: THE TERMS



- Payment of prepetition claim
  - No assurance of 100% payment of critical vendor's claim
- **Quid pro quo**: Critical vendors are typically required to extend post-petition credit in accordance with their “customary trade” terms (e.g., the most favorable terms provided in the year or so before the bankruptcy filing)
  - Risk of disgorgement of critical vendor payments if creditor stops extending credit
- Other key terms
- Form trade agreement (more on that later . . .)
- It's all subject to negotiation!



# *Key Considerations for Credit Professionals*



# EVALUATING AND LEVERAGING CRITICAL VENDOR TREATMENT



- Understand leverage from a business perspective
  - Prime (and potentially only) opportunity to negotiate favorable positioning in connection with the Chapter 11 case
- Evaluate debtor-customer's liquidity
  - DIP financing
  - Liquidation analysis / projections
- Time value of money
  - What does the Debtor's exit look like?
- Managing the discussion internally within your organization

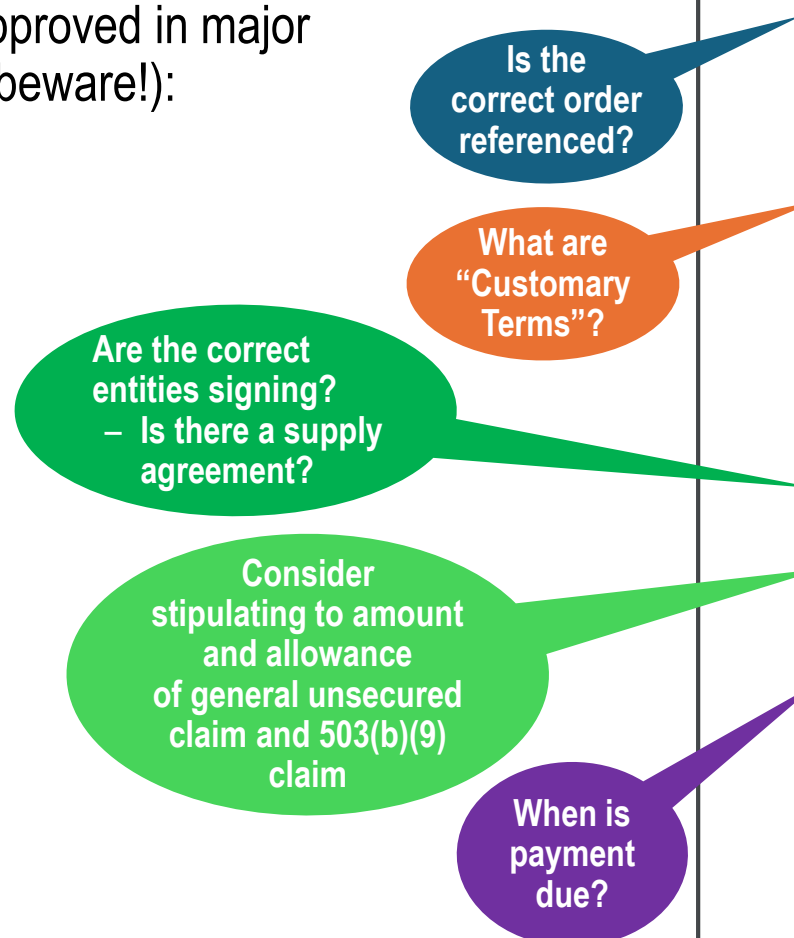


# *Lawyering Critical Vendor Agreements*



# CRITICAL VENDOR AGREEMENT

- An actual form critical vendor agreement proposed by Debtor and approved in major chapter 11 case (creditors beware!):



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**Sample Trade Agreement**

Under the Interim Order (I) Authorizing the Debtors to Pay Pre-petition Claims of (a) Lien Claimants, (b) Import Claimant, (c) 503(B)(9) Claimants, (d) Foreign Vendors, and (e) Critical Vendors, (II) Confirming Administrative Expense Priority of Outstanding Orders, and (III) Granting Related Relief [Docket No. \_\_\_] (the "Interim Order"), as a condition to receiving any payment under the Interim Order, a payee must maintain or apply, as applicable, trade terms during the pendency of these chapter 11 cases that are at least as favorable as ordinary course trade terms existing prior to the Petition Date or otherwise satisfactory to the Debtors ("Customary Terms"). If a payee, after receiving a payment under the Interim Order, ceases to provide Customary Terms or refuses to supply the captioned debtors in the Interim Order (the "Debtors"), then the Debtors may, in their sole discretion, deem such payment to apply instead to any post-petition amount that may be owing to such payee or treat such payment as an avoidable unauthorized post-petition transfer of property.

For purposes of administering this trade program, as authorized by the Bankruptcy Court and in accordance with the terms of the Interim Order, the Debtors and [\_\_\_] ("Counterparty") agree as follows (the "Agreement"):

The estimated balance of all prepetition amounts due and owing to [Counterparty] in these chapter 11 cases (net of any setoffs, credits or discounts) (the "Trade Claim") is [\_\_\_].

The Debtors shall pay [Counterparty] [\_\_\_] (the Settlement Amount) upon acceptance of this letter agreement and [Counterparty] waives the right to any further recovery (including, but not limited to, any right to recover under 11 U.S.C. § 503(b)(9)) or distribution with regard to the Trade Claim.

[Counterparty] agrees to supply goods/services to the Debtors on [\_\_\_] day



# CRITICAL VENDOR AGREEMENT (CONT'D.)

- An actual form critical vendor agreement proposed by Debtor and approved in major chapter 11 case (creditors beware!):

Consider including credit terms and credit limit

Consider reserving right to amend pricing

Consider including events of default to justify terminating credit:

1. Failure to pay settlement amount
2. Failure to timely pay invoices
3. Default under any prepetition supply agreement
4. Default under or loss of DIP financing
5. Conversion or dismissal of case

payment terms, and the Debtors agree to pay [Counterparty] in accordance with such trade terms (the "Payment").

Any applicable open trade balance or credit line that [Counterparty] will extend to the Debtors for shipment of post-petition goods/services will be on an as needed basis and shall not be capped.

In consideration for the payment described herein, [Counterparty] agrees not to file against the Debtors, their estates, any other related person or entity, or any of the Debtors' respective assets or property (real or personal) any claim of lien (regardless of the statute or other legal authority upon which such claim or lien is asserted) related in any way to any remaining prepetition amounts allegedly owed to [Counterparty] by the Debtors for goods or services [Counterparty], provided to the Debtors prior to the Petition Date (such goods or services, "Prepetition Goods and Services"). Furthermore, if [Counterparty] has taken steps to file or assert any lien or liens for Prepetition Goods and Services prior to entering into this letter agreement, [Counterparty] agrees to take the necessary steps to remove such lien or liens as soon as possible.

After receipt of the Payment by [Counterparty], if [Counterparty] refuses to continue to supply goods or provide services to the Debtors in accordance with the Customary Terms for any reason other than mutual agreement of the Debtors and [Counterparty], the Debtors' breach of the Customary Terms or expiration of the Customary Terms in the ordinary course of business, then (i) any Trade Claim payment received by [Counterparty] may be deemed by the Debtors as an unauthorized post-petition transfer under section 549 of the Bankruptcy Code that the Debtors may either (a) recover in cash or (b) at the Debtors' option, apply against any outstanding administrative claim held by [Counterparty] and (ii) upon recovery of any Trade Claim payment, the corresponding prepetition claim will be reinstated in the amount recovered by the



# CRITICAL VENDOR AGREEMENT (CONT'D.)

- **That's it?! Other potential provisions:**
  - Resurrection of allowed prepetition claim if settlement payment is clawed back
  - Automatic allowance, and payment in the ordinary course, of administrative expense claim for undisputed post-petition invoices
  - Preference waiver (court approval needed)
    - Or, if preference waiver is unavailable:
      - ❑ Preference claim is not a basis to withhold payment of administrative expense claim; and
      - ❑ Preservation of subsequent new value defense despite payment of prepetition claim

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Debtors.

Your execution of this Agreement and return of the same to the Debtors constitutes an agreement by [Counterparty] and the Debtors.

3



# CRITICAL VENDOR AGREEMENT (CONT'D.)

- **That's it?! Other potential provisions:**
  - Most favored nation provision (plan treatment)
  - Confidentiality
  - Termination date (e.g., effective date of plan, sale of business, and/or fixed time period)
  - Binding on successors and assigns (including a chapter 7 trustee or post-effective date fiduciary!)

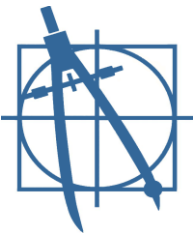
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# *The Impact of the Creditors' Committee*





# I CREDITORS' COMMITTEES: BACKGROUND

- Bankruptcy Code provides for the appointment of an Official Committee of Unsecured Creditors in Chapter 11 cases
- The Committee acts as a fiduciary for all unsecured creditors
  - Counterbalance to the Debtors (and other key players in the case)
  - Seeks to maximize value for substantially all unsecured creditors
- Standing to be heard on virtually all matters in the case
- Retains professionals (e.g., legal counsel, financial advisor, investment banker)
  - Fees and expenses are paid by the bankruptcy estate!
- Potential goals:
  - Maximize distributions
  - Minimize preference risk
  - Manage the claims pool
  - Preserve or secure a viable go-forward customer (e.g., reorganized debtor or third-party purchaser)

# CREDITORS' COMMITTEES & CRITICAL VENDOR PROGRAMS



- Selection/vetting of critical vendors
- Monitoring critical vendor budget (cap on claims, usage of funds, etc.)
- Potential impact on case strategy and claims pool
- Reviewing the proposed critical vendor order and form trade agreement

# I COMMITTEE MEMBERS? POSSIBLY YOU!



- An active and engaged Committee is absolutely . . . critical!
  - Committee make-up matters
- Until a creditor has a signed and effective critical vendor agreement that releases its claim(s), consider seeking appointment to the Committee
  - Inside seat at the “table” in the case
  - Potential impact on critical vendor negotiations



*Any questions?*

