
**BANKRUPTCY ISSUES &
COLLECTION PRACTICES
FOR UTILITIES**

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BANKRUPTCY DO'S AND DON'TS

DO:

- Pay close attention to any bankruptcy notice that you receive.
 - Alert all persons who might be collecting on the account (including collection agents)
 - Close out the old account and open a new account for the debtor as of the date of the bankruptcy filing
 - Notify your in-house counsel or attorney immediately
 - File a Notice of Appearance
 - Consider attending the Meeting of Creditors
 - File a claim for any unpaid pre-petition debts
 - Monitor all subsequent bankruptcy pleadings
 - Require adequate assurance of future payments consistent with § 366 of the Bankruptcy Code
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DON'T:

- Continue to collect a pre-petition debt from a bankrupt debtor
 - Ignore bankruptcy pleadings
 - Assume you will be unable to collect any money from the debtor
 - Cut off the debtor's utilities for their failure to pay pre-petition debts
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11 U.S.C. § 366 - Utilities

- This section describes what utilities may and may not do to collect accounts from bankrupt debtors. It gives utilities more rights than other creditors might have.
 - § 366 mandates that a utility company cannot cut off services to a debtor just because he/she has filed a bankruptcy petition or because there is an unpaid pre-petition debt.
 - You can, however, cut off a debtor's utility account if he/she has not given you "adequate assurance of payment" within 20 days of the order for relief (or 30 days from the petition for a chapter 11 debtor).
 - The utility company can establish what it believes is adequate; however, the court has the authority to order the utility to accept a lower adequate assurance deposit.
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- "Assurance of payment" is defined as:
 - Cash deposit
 - Letter of credit
 - Certificate of deposit
 - Surety bond
 - Prepayment for services
 - An administrative claim is not assurance of payment, except in a chapter 11 case
 - A utility can set off a pre-petition debt against a pre-petition security deposit.
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What is Chapter 11?

- Who can be a debtor?
 - How does a Chapter 11 debtor receive a discharge?
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Procedures of Chapter 11

- Petition
 - First Day Pleadings
 - Statements & Schedules
 - Meeting of Creditors
 - Monthly Operating Reports
 - Disclosure Statement
 - Plan
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Considerations for The Unsecured Creditor

- Notice of Appearance
 - Bar Date for Filing Claims
 - Disclosure Statement
 - Voting on the Plan
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Minimizing Preference Exposure

- My advice: The only thing worse than accepting a preferential transfer is turning one down.
 - Elements of a preferential transfer (found in 11 U.S.C. § 547):
 - Transfer of an interest of the debtor in property
 - To or for the benefit of a creditor
 - On account of an antecedent debt
 - Made while the debtor was insolvent
 - Made within 90 days of the bankruptcy filing (if not an insider)
 - That enables the creditor to receive more than it would have received in a chapter 7 liquidation
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- Most common defenses to a preferential transfer action:
 - Contemporaneous exchange for new value
 - Provision of subsequent new value
 - Paid in the ordinary course of business between the parties
 - How to best insulate yourself from a preference action
 - Stay in tune to the business climate in your area to know which large customers might have financial difficulties
 - Keep a sufficient deposit
 - Ask for a letter of credit or a utility surety bond
 - Ask a troubled customer to pre-pay for its services
 - Try to keep accounts as current as possible... an ounce of prevention goes a long way
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Fair Debt Collection Practices (Fair Debt Collection Practices Act – 15 U.S.C. § 1692)

- The FDCPA protects only individuals, not corporations
 - FDCPA applies to anyone collecting a debt on behalf of another, including debt collection agencies and attorneys
 - While the FDCPA does not apply to companies collecting debts on their own behalf, creditors should comply with the act because many state laws prohibit "unfair" business practices
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■ **Communicating with the consumer**

- ❑ Cannot be at an unusual time or place unless the consumer gives special permission otherwise
 - ❑ Should assume that a convenient time for communication with the consumer is between 8:00 am and 9:00 pm local time unless the collector has information to the contrary
 - ❑ Cannot communicate with the consumer if he/she is represented by an attorney
 - ❑ Cannot communicate with the debtor at his/her place of employment if the collector knows that the employer prohibits personal calls
 - ❑ If the consumer notifies the collector in writing that he/she refuses to pay the debt or that he/she does not wish to receive further communication, most communications with the consumer must stop
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- Communicating with third parties
 - Cannot communicate with a third party in connection with the collection of the debt except
 - In an attempt to obtain location information about the consumer (even then, there are specific guidelines)
 - If the court grants the collector permission to contact third parties
 - To effectuate a post judgment remedy, such as garnishments
 - A collector can always communicate with the consumer's attorney
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- Collector cannot engage in conduct that is intended or has the effect of harassing, oppressing or abusing any person with regard to the collection of a debt
 - The use of any false representation or deceptive means to collect a debt or to obtain information regarding the consumer is prohibited.
 - Certain other unfair or unconscionable practices are prohibited
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- **A written "validation notice" must be sent within five days of the original communication with the consumer, containing the following information:**
 - ❑ The amount of the debt
 - ❑ The name of the creditor
 - ❑ A statement that unless the consumer, within 30 days after the receipt of the notice, disputes the validity of the debt that the collector will assume the debt to be valid
 - ❑ A statement that if the consumer disputes the debt in writing within 30 days, the collector will mail a copy of the verification of the debt to the consumer (If the consumer does dispute the validity of the debt, all collection efforts must cease until a verification is sent to the consumer)
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- A violation of the FDCPA carries potential liability of \$1,000 per occurrence, plus any actual damages suffered by the consumer as a result of the violation (including court costs and attorney's fees)
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Phillip Young is an attorney in Columbia. Phillip's practice focuses on the representation of corporate creditors and debtors in bankruptcy court. If you have further questions regarding the subjects contained herein, you may contact Phillip at 931-381-0057 or email him at phillip@younglawoffices.net.
