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## 8 Questions You MUST Ask When Being Sued In Bankruptcy Court

You have been sued in bankruptcy court for money you've been paid. I'm sure this comes as a shock to you. Your company may have never done business before in the state you've been sued in and you may not even be aware that your customer was in bankruptcy. But now you're being sued to get back money that was paid to you during the 90 days before the bankruptcy was filed.

I know *this feels grossly unfair* because you were paid in good faith for the work you did or the goods you shipped. Most clients are outraged by these lawsuits, and understandably so. Besides the fact that they have done nothing wrong, returning that money could be very painful for them. Writing off an uncollectible debt is bad enough; but returning money that's already been spent is much worse.

Adding insult to injury is the fact that you'll also need to pay money to defend this lawsuit. The alternative – doing nothing and letting the lawsuit go to judgment – is much worse. There's an active market for the sale of these judgments, and an aggressive law firm or collection agent will buy the judgment, bring it to your state and do what it can to get paid. I know you're frequently a creditor yourself so you understand all of the weapons that are available to collect a judgment: seizing bank accounts; auctioning off furniture and equipment; attaching receivable payments due from other customers.

You may also find that finding a lawyer in bankruptcy law is cumbersome and expensive. The bankruptcy community is small and closely-knit, and you may have to rely upon a Google search or the hope that your regular attorney knows someone good in my state. Of course, I'm sure you've already been contacted by several other lawyers like me who want to help you defend your case.

Before you decide what to do next, there are 8 questions you need to consider about this lawsuit and what you should expect from the process.

1. Am I going to have to pay back any money?



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The short and unhappy answer to this question is probably *yes*. These lawsuits are extremely common, and the system is set up to make it much easier (and less expensive) for you to settle than for you to assert your defenses. For example, there may be *mandatory mediation* even before discovery. You will have to participate in a settlement process that will involve either traveling to the state in which you've been sued, hiring an attorney to participate in the mediation, or both. Many times it's simply easier to make payment to the plaintiff and make the case go away than it is to participate in the mediation ordeal.

I know this feels very wrong; that the process is really stacked against you and that you are being coerced into making a settlement. I wish I could tell you that you're wrong and that the process is designed to be as fair as possible to you, but though there may be an argument for that, I can't say it with a straight face. You've been thrown into a system that is hostile, expensive and somewhat one-sided, but it is the reality. Almost every one of these lawsuits settle, with the defendant paying something.

2. But do I really have to pay any money back?

Every once in awhile, you may find that you have a complete defense. Perhaps you really did receive your payment in the ordinary course of business, within the contract terms. Perhaps the time between invoice date and payment date was the same as that time for the two or three years before the bankruptcy. Perhaps you have unpaid invoices for shipping goods or performing services after receiving the payment. These are your best defenses.

Unfortunately, the ordinary course defense can be fragile. Companies sliding into bankruptcy frequently do slow in their payments to vendors. Vendors respond by stepping up collection efforts. Sometimes checks bounce. Other times, vendors change payment methods because they feel insecure. Any of these actions can destroy an ordinary course of business defense to this lawsuit.

3. Do I have to defend the lawsuit in whichever state I've been sued?

In a word, yes. Countless battles have been fought about whether a defendant who never did business in the state still has to defend there. The courts always rule that they do. Federal bankruptcy courts have nationwide reach of service, so it's impossible to stay clear of them.

4. Can I avoid service?

It comes as a terrible surprise to most of my clients that the service can be done by regular mail. Many companies who are used to being personally served by the sheriff or a private process



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server are taken off guard when they realize they're in default because they were waiting for something more than just an envelope containing a complaint that arrived in regular U.S. mail.

5. But if I have to repay this my company will go out of business.

Although this is not really a question, it's an issue that concerns many of my clients. In most cases, the plaintiff in these lawsuits has no emotional stake in the outcome: it's all about processing hundreds (or thousands) of similar cases and collecting the money. They don't want to get a judgment that can't be collected. When that happens, I frequently negotiate what I call "the insolvency defense", sending the plaintiff's lawyer my client's balance sheet and profit/loss statement to show that the collection of the judgment may be more trouble than it's worth. I've had a fair amount of success with this for clients who are on the verge of filing bankruptcy themselves.

6. Is this expensive to defend?

I won't deny that there is a cost in defending the lawsuit. Each state bankruptcy bar is filled with very good lawyers who practice in a complex field. They know the system and the other lawyers and therefore have an advantage when dealing with these matters. However, I always try and keep my fees as low as possible, understanding that most of my clients will likely end up making a payment to settle the matter. **Also, for qualified clients, I will defend the matter without asking for any money up front. It may be easier for you to qualify than you think,** and it's good to know that you can have a lawyer watching out for you without having to break the bank before you even get to know him.

7. Can I fight?

Yes, you can fight if that makes sense. The bankruptcy judge who will hear your case (or a jury under the right circumstances) will fairly apply the law. Sometimes there's enough money at stake that it's worth fighting to try and get the best possible result. You should expect to be involved in the mandatory mediation I discussed above, and if the case doesn't settle to respond to interrogatories, production of documents, and deposition requests. Of course, you will have the right to serve these discovery requests upon the plaintiff as well.

8. What do I do next?

I strongly recommend that you contact an attorney in the state you've been sued in to protect your rights. I also recommend that you begin by asking your own company attorney if he or she can refer you to someone who is licensed in that particular state and practices in the bankruptcy



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field. To set up a free conversation with our firm, call **302-257-5163 and I'll make sure to talk to you right away.**

To help you know a little bit more about me, I have a profile on Avvo.com, a legal review site that contains the best selection of lawyer reviews on the Internet. I have over 80 five star reviews there, the most of any bankruptcy lawyer in Delaware. (You can search for me on Avvo.com, or take a shortcut by going to [Drescherreviews.com](http://Drescherreviews.com).)

I know it's an awful feeling being sued, even worse when it's not near your company and then worst of all, when you've done nothing wrong. I hope this information has been helpful.