

SECTION

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# The Record BUSINESS

TUESDAY, JANUARY 8, 2008

THE MARKETS

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## ASK A LAWYER

# Ins and outs of payments, bankruptcies

**Q. What should I do if I received a payment from a customer within the 90 days before that customer's bankruptcy filing?**

When a company files for bankruptcy, vendors risk being sued for the return of "preferential" payments made by the debtor-customer shortly before the date of its bankruptcy filing. Although the Bankruptcy Code has a five-point test for determining which payments are preferential, all payments made by a debtor-customer within 90 days of a bankruptcy filing have the potential of being deemed preferential. If a payment is found to be preferential, the money paid to the vendor must be returned for the benefit of all of the creditors of the debtor-customer's bankruptcy estate.

It is important to know that not all payments made by debtors within 90 days of a bankruptcy filing will be deemed preferential.

The Bankruptcy Code provides a number of notable defenses to preference claims. Therefore, when a creditor is served with a letter demanding repayment of an alleged preferential payment or a complaint asserting a preference claim, the creditor should not simply comply by making the requested payment, but rather should adequately and timely respond to the allegations and raise the appropriate defenses.

Payments made by a debtor-customer in the ordinary course of business and according to ordinary business terms are typically exempt from preference recoveries. The ordinary course of business defense depends on the collection and payment history between the creditor-vendor and debtor-customer as well as industry standards. Additionally, a creditor-vendor may be able to assert what is known as the subsequent new value defense if, after receiv-

ing the alleged preferential payment, the creditor-vendor furnished products or services and did not get paid. If a creditor is successful on these defenses, the court will not require the creditor-vendor to return the challenged payments.

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