

## What if a vendor is considering bankruptcy?



David A. Agay | Wednesday, March 18, 2020

Recently, [I posted about strategy](#) if a client learns of a customer potentially filing for bankruptcy protection. Many of the same considerations will pertain if suppliers or other vendors go down the same path.

As a knee-jerk reaction, clients may immediately seek to re-source and handle the matter internally. However, that option may not exist. Certain suppliers may have rendered themselves non-fungible either because of their position or pricing in the market or because regulatory, tooling, or other requirements translate into long lead times to replace a key supplier. This means that trying to switch to a new supplier in some instances may require short or long operational disruptions. In addition, the parties may have contractual relationships a supplier can enforce against client, or a client may have inbound or outbound intellectual property licenses with a distressed supplier. These types of commercial relationships could complicate re-sourcing, particularly where the supplier files for bankruptcy protection.

Typically, the client's short-term and long-term business exigencies and goals will drive the legal strategy. As part of our client dialogue, we have to understand how a supplier fills a client need and how loss of that supplier will impact the business. Thereafter, we will work with the client to understand both the business and legal leverage points. We also will explore creative solutions to engineer win-win outcomes to protect the client's interests while assisting in a supplier's turnaround. As a last resort, it may be necessary to initiate litigation to enforce certain rights and remedies, including obtaining inventory, equipment, or

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work in process from a supplier. Throughout the process, and in negotiating interim or final compromises, we have to consider potential clawback risk if a customer with whom we settle later files for bankruptcy and tries to bring preference or fraudulent conveyance actions to unwind a transaction.

In many of our engagements, we work with owners, directors, officers, managers, and other individuals experiencing tremendous stress because of difficult circumstances. When fighting for the survival of a business, it is understandable when emotions spill over. Occasionally, clients will want to extract the proverbial “pound of flesh.” It is our job as crisis managers and legal advisors in these situations to remain steady and assist the client in staying focused on the business and legal objectives.

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[Team member bio](#)