

PUSH, DON' T SHOVE: COMMENCING AN INVOLUNTARY BANKRUPTCY CASE

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Most bankruptcies are voluntary but sometimes creditors may want or even need to force a debtor into bankruptcy in order to protect the creditor's interests and/or preserve the debtor's assets. Involuntary bankruptcies must be filed as either Chapter 7 or 11; you cannot force a Chapter 13 and they can only be filed against a person, except a farmer, family farmer, or corporation that may be a debtor under the selected chapter. Involuntary cases are governed by 11 U.S.C. § 303.

First, find other creditors to join you; bankruptcy is not designed to help the collections efforts of a single creditor. An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title—

(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount, or an indenture trustee representing such a holder, if such non-contingent, undisputed claims aggregate at least \$10,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724 (a) of this title, by one or more of such holders that hold in the aggregate at least \$10,000 of such claims;

(3) If such person is a partnership—

(A) by fewer than all of the general partners in such partnership; or

(B) if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership; or;

(4) by a foreign representative of the estate in a foreign proceeding concerning such person.

A few words to the wise; the Code provides penalties for petitioning creditors who improperly force a debtor into bankruptcy and so any creditor's counsel considering an involuntary bankruptcy must, at a minimum, conduct a statutory analysis and weigh non-bankruptcy alternatives (such as state court litigation, attachments, trustee process, etc.) before "pushing" a person or entity into an involuntary bankruptcy.

A Court can also decide to abstain. Section 305(a)(1) permits the Court to dismiss a case if "the interests of the creditors and the debtor would be better served by such dismissal or suspension." 11 U.S.C. § 305(a)(1). Dismissing a case under § 305(a)(1) is a discretionary decision made by courts on a case-by-case

basis. In re Fortran Printing, Inc., 297 B.R. 89, 94 (Bankr. N.D. Ohio 2003). Factors to consider in dismissal under § 305(a)(1) include: (1) the purpose of the bankruptcy, (2) availability of a more appropriate forum to decide the unsettled issues, (3) efficiency and economy of administration, and (4) the interest of the creditors and debtor. See In re Deacon Plastics Mach., Inc., 49 B.R. 982, 982 (Bankr. D. Mass. 1985); In re Nesenkeag, Inc., 131 B.R. 246, 247 (Bankr. D.N.H. 1991). See also In re Maroun, 427 B.R. 200 (Bankr. D. N.H. 2010) for a discussion of abstention under 28 U.S.C. § 1334(c)(1). For a more in-depth view into the statutory elements concerning bona fide disputes listed in 11 U.S.C. § 303 (1) see In re Fustolo, 503 B.R. 206 (Bankr. D. Mass. 2013).

Second, once you have done all of your due diligence and believe that you have proper standing and have met the requirements of 11 U.S.C. § 303, complete involuntary petition form B5. It is similar to the voluntary petition a debtor would complete to start her own bankruptcy, except that it is completed and filed by the creditors. In these situations, the creditors must pay the filing fee instead of the debtor.

Third, file the bankruptcy papers with the appropriate court. An involuntary bankruptcy must be filed in a court with jurisdiction over the county in which the debtor resides, is headquartered or does business. Each state has at least one bankruptcy district that may or may not be subdivided into divisional offices. Each county within a state is assigned to a specific district and division (if applicable).

Fourth, serve the process on the debtor. Like a civil complaint, an involuntary petition must be served upon the debtor by a professional process server. This starts the clock, so to speak, on the bankruptcy, giving the debtor twenty (20) days to file objections.

Lastly, don't go it alone. If you are not a very experienced bankruptcy litigator, please contact me at wamann@cda-law.com or at Craig, Deachman & Amann, PLLC at 603-998-0033. Involuntary petitions are valid and if done correctly, can benefit your creditor-client greatly but a petitioning creditor(s) can quickly become a defendant facing real damages if the involuntary petition is not pursued correctly.