

December 14, 2016

---

# MY CUSTOMER FILED BANKRUPTCY: NOW WHAT?

PRESENTATION FOR:  
NACM'S 2016 AUDIO  
TELECONFERENCE SERIES

**Presented by:**

**Bruce S. Nathan, Esq.**  
**Partner**

**Bankruptcy, Financial Reorganization  
& Creditors' Rights Group**

**LOWENSTEIN SANDLER LLP**

(212) 204-8686

[bnathan@lowenstein.com](mailto:bnathan@lowenstein.com)

[www.lowenstein.com](http://www.lowenstein.com)

[@BruceSNathan](https://twitter.com/BruceSNathan)

**Lowenstein  
Sandler**

## Different Bankruptcy Cases – Chapter 7

- Liquidation
- As a General Rule, Business Terminates Operation
- Trustee is Selected to
  - Sell or collect assets of Debtor
  - Investigate/prosecute claims against third parties
  - Reconcile claims

## Different Bankruptcy Cases – Chapter 11

- Reorganization or Rehabilitation of Business
- Liquidating Chapter 11
- Debtor's Management Continues
- Chapter 11 Trustee Displaces Management – the Exception
  - Cause, including fraud, dishonesty, incompetence or gross mismanagement
  - Appointment in creditors' best interests
  - Grounds to convert or dismiss case
  - Special United States Trustee Grounds based on fraud

## Bankruptcy Checklist – What Should Creditors Be Doing When They Hear Their Customer Filed Chapter 11

- File Preservation/Info Gathering
  - Preserve credit and other files – paper/electronic, including emails
  - Information gathering regarding proof of claim
    - Invoices and bills of lading re: goods received by Debtor within 20 days of bankruptcy filing in support of Section 503(b)(9) 20 day goods priority claim
  - Information gathering re preference exposure and defenses
    - Payments received within 90 days of bankruptcy filing
    - Analysis of preference defenses
      - Invoices/proof of delivery for new value defense
      - Pay history for subjective ordinary course defense
      - Credit group data for objective ordinary course defense

## Review First Day Pleadings In Chapter 11 Cases

- Affidavit or Declaration in Support of First Day Motions Provides Detailed Information Useful to Creditors
  - What caused the chapter 11 proceeding?
  - What the Debtor intends to do in the immediate future?
- Chapter 11 Financing/Use of Cash Collateral
- Payment of Pre-Petition Payroll and Employee Benefits
- Prohibiting Utilities From Altering, Refusing or Discontinuing Service
- Payment of Pre-Petition Shipping and Related Charges
- Critical Vendor

## Importance of DIP Financing/Cash Collateral Order

- DIP (Chapter 11) Financing Order Approves New Financing by Either
  - New lender
  - Existing lender
- Cash Collateral Order Allows Debtor to Use Cash Proceeds of Lender's Collateral

## DIP Financing/Cash Collateral Order

- Usually Approved On an Interim Basis Shortly After Chapter 11 Filing and on a Final Basis a Few Weeks Later
- Usually Includes a Budget of Approved Debtor Expenditures
  - Generic description of expenditures, e.g., vendor payments
- Cash Collateral Use Might Not be as Flexible as DIP Financing

## DIP Financing/Cash Collateral Order

- Contain Lots of Onerous Lender-Friendly Provisions
  - Beware of “roll-up” – little or no new advances
  - Beware of provision that grants lien and extends superpriority claim status re: preference claims
  - Beware of prohibition of payment of section 503(b)(9) priority claims
  - Beware of provision wiping out or subordinating creditors’ setoff rights
  - Beware of surcharge waiver, exorbitant fees

## Risks of Doing Business With a Chapter 11 Debtor: *Delco Oil Decision*

- Do Not Do Any Business Until DIP Financing and/or Cash Collateral Order Approved!
  - Check for interim order
  - Check later for final order
  - Check budget

## Use of Cash Collateral – Risks of Doing Business With a Chapter 11 Debtor: *Delco Oil* Decision

- Per Bankruptcy Code Sections 549(a) and 550(a), a Trustee Can Seek Recovery of Debtor's Unauthorized Post-Petition Payments
- U.S. 11<sup>th</sup> Circuit Court of Appeals, in *Delco Oil*, Held Debtor Was Not Authorized to Use its Lender's Cash Collateral, Violating § 363(c)(2) of the Bankruptcy Code
- Court Upheld Trustee's Recovery of Debtor's Post-Petition Payments Totaling Approximately \$2 million to a Vendor for Post-Petition Purchases

## Use of Cash Collateral – Risks of Doing Business With a Chapter 11 Debtor: *Delco Oil* Decision

- The *Delco Oil* Court Was Not Influenced by the Following:
  - Seller lacked knowledge of the unauthorized payments
  - Seller's post-petition sales to the Debtor were in the ordinary course of business
  - There was no harm to either the secured lender or Debtor's estate because the Debtor had received goods of equivalent value to the post-petition unauthorized payments

## Critical Vendor Orders

- There is no Bankruptcy Code Provision that Expressly Authorizes Critical Vendor Status
- It is Court-Created Based on Doctrine of Necessity
  - Limited by 7th Circuit Court of Appeals decision in *Kmart Corporation*, but doctrine still alive in many jurisdictions
- Critical Vendor Status Contingent on Court Approval Authorizing (Not Directing) Debtor's Payment of Claims of Creditors Deemed Critical or "Essential" to Debtor's Ongoing Business/Successful Reorganization
  - Debtor designates critical vendors
  - Frequently includes Section 503(b)(9) "20 day goods" priority claims

## Critical Vendor Orders

- Standard for Debtor Determining Critical Vendors
  - Debtor has broad discretion
  - Courts have the final say
  - Courts have reached varying holdings on when a vendor is "critical"
    - Some courts are stricter than others
    - Vendor less likely to be critical if it is obligated to continue selling to Debtor via pending supply contract

## Critical Vendor Orders

- No Assurance of 100% Payment of Critical Vendor's Claim – Subject to Negotiation
- Quid Pro Quo: Creditors Receiving Such Payments Must Agree to Extend Post-Petition Credit (Entitled to Administrative Priority Status) and Other Terms
- Critical Vendor Agreement Should Be Reviewed by Counsel
  - Negotiate payment and other terms
  - Be careful of fine print that prevents any change in prices and other non-credit related terms
  - Risk of disgorgement of critical vendor payments if creditor stops extending credit
  - Negotiate default provision that gives critical vendor an out

## Critical Vendor Orders

- Designation as a Critical Vendor Does Not Protect Against Preference Risk
  - Release of preference claim vs. critical vendor – hard to get!
  - Impact of Debtor's post-petition payment of pre-petition "new value" invoices on new value defense to preference claim



## Automatic Stay

- Bankruptcy Filing Stays Creditor Action Against Debtor
  - Collect Pre-petition claim
  - Terminate agreements (such as supply agreements)
  - Foreclose on collateral
  - Setoff
  - Commencing or continuing lawsuit
  - Enforcing judgment
  - Creditor cannot stop doing business if otherwise bound by contract
    - Otherwise creditor is free to cease business with Debtor

## Automatic Stay

- Can Goods Providers Switch From Credit to COD/CIA Terms?
  - Permitted under agreement(s) with Debtor?
  - State law (e.g., Uniform Commercial Code)
  - Response to threats of breach of contract/violation of automatic stay
  - Moving for relief in Bankruptcy Court
- Consequences of Stay Violation
  - Contempt of court
  - Sanctions
- Does Not Apply to Actions Against Non-Debtors
  - Drawing on letter of credit
  - Claim vs. guarantors

## Uniform Commercial Code Remedies: *Adequate Assurance Demand*

- UCC §2-609 Governs for Goods Sellers
- Upon Reasonable Grounds for Insecurity, a *Contract Party* Can Demand Adequate Assurance of Performance From Financially Distressed Party
  - Form of adequate assurance demand, Tab 1 of Supplement

## Uniform Commercial Code Remedies: *Adequate Assurance*

- Reasonable Grounds for Insecurity
  - Determined by “commercial standards” as between merchants
  - Risk of administrative insolvency
    - Insufficient assets to full pay all administrative expense claims
- What Constitutes Adequate Assurance of Performance?
  - Revoke credit terms and switch to cash in advance
  - Collateral security
  - Letter of credit

## Adequate Assurance Remedy: *Creditor Action*

- Pending Receipt of Adequate Assurance, Creditor Can Suspend Performance
  - Switch to cash in advance
  - Negotiate more restricted credit terms
- Beware of Contract Provisions Limiting Adequate Assurance Rights!
- Post Bankruptcy Assertion of UCC Adequate Assurance Rights
  - Automatic stay issues
  - Motion for adequate assurance/adequate protection

## Stoppage Of Delivery

- Creditor's Right to Stop Delivery of Goods to Customer Due to Insolvency or Breach Governed by UCC §§2-702, 2-703 and 2-705
  - Debtor's insolvency
    - Balance Sheet: Liabilities exceed assets
    - Equity: Failure to pay debts as they mature
- Withholding Delivery of Goods in Creditor's Possession and Switching to Cash Terms Going Forward
- Stopping Delivery of Goods in Possession of Carrier/Warehouse/Other Third Party

## Stoppage Of Delivery

- Notice Must be Given to Carrier/Warehouse and Debtor
  - Form of stoppage of delivery notice, Tab 2 of Supplement
- Following Notice, Carrier, Warehouse/Other Third Party Must Hold and Deliver Goods According to Seller's Direction
  - Seller responsible for charges of carrier/warehouse holding goods prior to release to Debtor or return to creditor

## Stoppage Of Delivery

- Right of Stoppage of Delivery Cut Off by Any of the Following:
  - Debtor's receipt of goods
  - Acknowledgment by warehouse or other bailee that it is holding goods for Debtor
  - Acknowledgment by carrier that is holding goods for Debtor by reshipping/holding
  - Seller's endorsement to Debtor of negotiable bill of lading or warehouse receipt

## Stoppage Of Delivery Rights

- Stoppage of Delivery Rights Not Impacted by Passage of Title/Risk of Loss
- Stoppage of Delivery Rights Superior to Secured Inventory Lender's Rights
- In Contrast, Reclamation Rights are Subordinate to Secured Inventory Lender's Rights

## Stoppage Of Delivery: *After Bankruptcy Filing*

- Seller Retains Rights Under UCC to Stop Delivery
- Few Courts that Have Addressed Whether Automatic Stay Bars Exercise Stoppage of Delivery Rights Have Held Stay Does Not Apply
- Debtor Usually Ends up Paying for Stopped Goods
- Seller Must Seek Automatic Stay Relief in Bankruptcy Court to Obtain Return of Goods (after they have been stopped)

## Bankruptcy Reclamation

- Avoidance Powers of Trustee Subject to Rights of Seller of Goods That has Sold Goods to Debtor in Ordinary Course of Seller's Business to Reclaim Such Goods if Debtor has Received Such Goods While Insolvent, Within 45 Days Before Commencement of Bankruptcy Case

## Bankruptcy Reclamation

- Written Reclamation Demand Required
  - Form of bankruptcy reclamation demand, Tab 3 of Supplement
- Demand must be received by Debtor no later than 20 days after Bankruptcy Filing
- Debtor's Insolvency – balance sheet
- Reclamation rights limited to goods in Debtor's possession
  - Only remedy – return of goods; no other statutory remedies
  - No provision for alternative remedy of administrative claim if reclamation is denied

## Bankruptcy Reclamation

- **WARNING !!! A SELLER'S RECLAMATION RIGHTS ARE STILL SUBJECT TO THE PRIOR RIGHTS OF A CREDITOR WITH A SECURITY INTEREST IN SUCH GOODS**
- Are Reclamation Claims Rendered Valueless by Debtor's Pre-Petition Secured Inventory Lender?
  - Division among courts

## Reclamation Catch 22

- Circuit City Stores (U.S. District Court, Eastern District of Virginia)
  - Creditor forfeited reclamation rights by just sending written reclamation demand and then failing to seek recovery of goods
- Catch 22: Creditor That Pursues Reclamation Rights Would Still Not Be Entitled to Relief Because Pre-Petition Lenders' Blanket Floating Lien on Inventory Renders Reclamation Claim Valueless
- Useless Remedy?

## Bankruptcy Reclamation – Prior Lien Defense

- *Dana Corporation* (Bankruptcy Court, Southern District, New York, 2007) relying on *Dairy-Mart Convenience Stores, Inc.*, Bankruptcy Court Southern District of New York 2002
  - Prior lien defense renders reclamation claims valueless, despite repayment of pre-petition secured loan by DIP financing

## Bankruptcy Reclamation Prior Lien Defense – A Contrary View

- 6th Circuit Court of Appeals Decision in *Phar Mor Case*
- Reclamation Goods Used to Pay Off Secured Creditor
- Unencumbered Cash (\$30 Million) Available for Distribution to Unsecured Creditors if Reclamation Claims Have No Priority Status



## Bankruptcy Reclamation Prior Lien Defense – A Contrary View

- Relying on Pre-2005 Amendments Reclamation Statute (Section 546(c)), 6th Circuit Ruled That IF Bankruptcy Court Denies Reclamation, Reclaiming Creditor is Entitled to Administrative Claim
- Rejected *Dana* and Other Court Holdings That Reclamation Rights are Wiped Out if Proceeds of Goods Paid Down Secured Claims

## Bankruptcy Reclamation Prior Lien Defense – A Contrary View

- Recent Delaware Bankruptcy Court Decision: in *In re Reichhold Holdings Inc.*
  - Overruled trustee's limited objection to creditor's administrative claim based on its reclamation rights
  - Agreed with *Phar Mor* decision
  - Disagreed with *Dana Corporation* and *Dairy-Mart* decisions
  - Court reserved all rights to object to the reclamation claim on other grounds

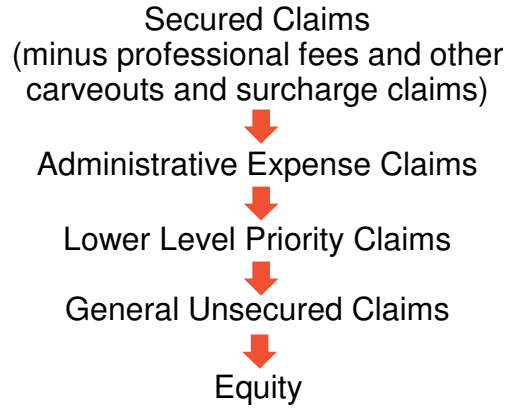
## Bankruptcy Reclamation Under BAPCPA – A Hollow Remedy?

- Sounds Great on Paper
- Recovery prospects uncertain, but possible!
- Send reclamation demand and don't ignore this remedy!

## Claims Priority

- Equitable Distribution of Debtor's Assets According to Size of Claim and Priority
- Hierarchical Distribution System
  - Higher priority claims must be paid in full before distributions to lower priority creditors
  - Parties could agree to different treatment

## Claims Priority



## Claims Priority

- Secured Creditors on Top
  - Lenders and/or secured creditors with security interests in Debtor's existing and after-acquired accounts, inventory, equipment and general intangibles
  - Trade creditors with purchase money security interest and consignment rights
  - Creditors with lien rights – *e.g.*, federal and state tax liens, state law materialman's/mechanic's and other liens and judgment liens

## Claims Priority

- Next In Line: Administrative Expense Claims
  - Actual and necessary costs and expenses of bankruptcy – All entitled to equivalent treatment
    - Post-petition sales via trade credit are priority administrative expense claims
    - Post-petition rent
    - Post-petition employee compensation
    - Post-petition professional fees
    - Section 503(b)(9) claims for “20 Day” Goods
      - Usually not paid until end of case
    - Must be paid in full on effective date of chapter 11 plan

## Claims Priority

- Risk of Extending Post-Petition Trade Credit
  - No guarantees – Disregard statements that dip financing “guarantees” payment of all post-petition trade claims
  - Need to review DIP financing order/use of cash collateral order
    - Budget
    - Borrowing terms
    - Available cash
    - Covenants/default risk
    - Security
  - Administrative insolvency
    - Insufficient assets to fully pay administrative claims
  - Conversion of case to Chapter 7 case
    - Chapter 7 administrative expense claims have priority over Chapter 11 administrative expense claims

## Claims Priority

- Next In Line: Lower Level Priority Claims
  - Wages/salaries/compensation earned within 180 days of the bankruptcy filing up to \$12,850 per employee
  - Employee benefit plans: claims for contributions for services rendered within 180 days of bankruptcy filing to the extent of \$12,850 multiplied by number of employees covered by plan less amounts paid on account of wage/salary priority claim
  - Certain taxes/other priority claims

## Claims Priority

- Next In Line: Pre-Petition General Unsecured Claims
  - Pre-petition unsecured trade claims
  - Same treatment
  - Disposition at conclusion of case
  - Exception – critical vendor

## Proof Of Claim

- Purpose:
  - Share in distribution
  - Vote on Chapter 11 plan
- Proof of Claim Deadlines:
  - Chapter 7
    - 90 days after 341 meeting of Debtor
  - Chapter 11
    - Court order
    - Clerk notice

## Proof Of Claim Checklist

- New Proof of Claim Form Effective 12/1/015
  - See new Proof of Claim Form 410, Tab 4 of Supplement
- See Best Practices For Preparing A Proof of Claim, Tab 5 of Supplement
- Amount of Claim
- Secured or Unsecured?
- Priority Status?
- Description of Claim
- Follow Directions, Including Where to File Claim
- Delivering Proof of Claim for Filing

## Proof Of Claim

- Impact of Missing Deadline
  - Loss of distribution
  - Loss of voting rights
- Exceptions to Deadline
  - Chapter 11
    - Claim scheduled
    - Not disputed/contingent/unliquidated

## Claims Objections

- Debtor/Trustee May File Objection to Creditor's Proof of Claim With Bankruptcy Court
- Grounds:
  - Debtor's records show no debt
  - Debtor's records show lesser amount of debt
  - Duplicate claim

## Claims Objections

- Creditor Must Timely Respond or Risk Reduction or Elimination of Claim
- Supporting Documentation to Provide
  - Invoices
  - Proof of delivery
  - Contract, if applicable

## Debtor's Monthly Operating Reports

- Provide Some or All of the Following Monthly Data
  - Receipts and Disbursements
  - Statement of operations
  - A/R reconciliation and aging
  - A/P and secured payments report
  - Inventory and Fixed Assets Report
  - Summary of Bank Activity
  - Check Register
  - Detail of Investment Accounts, Petty Cash, Report of Taxes Owed and Due
  - Officer or Owner Compensation
- Not Uniform Across Jurisdictions



## Section 503(b)(9) “20 Day” Administrative Priority Claims

- Administrative Claim for the Value of Goods Debtor Received Within 20 Days of Bankruptcy Filing
- 20 Day Goods Must be Sold to the Debtor in the Ordinary Course of Debtor’s Business
- Safety Net for Trade Creditors that Supply Goods Not Services!
  - Replaces reclamation as effective trade creditor remedy

## Assertion of “20 Day” Goods Administrative Claims And Timing Of Payment

- General Rule – Section 503(b)(9) Request/Allowance Requires Notice and a Hearing
  - No automatic administrative claim without court approval
- No Federal Bankruptcy Rule Specifying Manner In Which To Assert Section 503(b)(9) Priority Claims
- Recent Decision: *In re Richfield Equities*, Bankruptcy Court, Eastern District of Michigan Requires Assertion of Section 503(b)(9) Priority Claim by Motion
  - Rejects assertion of Section 503(b)(9) claim via proof of claim
- Timing of Payment - Most Courts Have Rejected Immediate Payment Over Debtor’s Objection

## Deadline to Assert “20 Day” Goods Administrative Claims

- No Deadline to Assert Section 503(b)(9) Claim in Statute
  - Local Bankruptcy Rules May Create Deadline
    - U.S. Bankruptcy Court Eastern District, Michigan
      - Local Bankruptcy Rule 3003-1 – Deadline to file proof of claim, or § 503(b)(9) motion in chapter 11 case: 90 days after first date set for Section 341 meeting of creditors
    - U.S. Bankruptcy Court, District of Massachusetts
      - Local Bankruptcy Rule 3002-1 – Deadline to file request for allowance of § 503(b)(9) claim: 60 days from first scheduled 341 meeting date

## Deadlines/Assertion Re “20 Day” Goods Administrative Claims

- Courts Are Also Setting Deadlines for Asserting Section 503(b)(9) Priority Claims
  - One claims filing deadline that includes Section 503(b)(9) priority claims and all other general unsecured claims
  - Alternate deadline: Separate deadline for asserting Section 503(b)(9) claims
- Courts Are Also Prescribing Manner of Asserting Section 503(b)(9) claims, either
  - On the same claim form as the creditor’s general unsecured claim, or
  - On a special proof of claim form solely related to Section 503(b)(9) claims

## Debtor's Setoff Rights As A Defense To Section 503(b)(9) Priority Claims

- Chapter 11 Debtors Have Successfully Offset Pre-Petition Credits, Deductions, Chargebacks, Overpayments, Rebates, and Similar Claims Against a Creditor First In Reduction of the Amount Owing to Creditors on their Section 503(b)(9) Priority Claims Instead of their Less Valuable General Unsecured Claims

## Debtor's Setoff Rights As A Defense To Section 503(b)(9) Priority Claims

- *Circuit City Stores* (Eastern District of Virginia) and very recent *AWI* (District of Delaware) Decisions
  - Debtor permitted to setoff pre-petition credits claims in reduction of Section 503(b)(9) priority claims
  - The courts invoked a little known Bankruptcy Code Section 558:
    - “The estate shall have the benefit of any defense available to the debtor...”
  - The Debtor could offset pre-petition credits claims against creditors' unpaid post-petition administrative claims — VERY DANGEROUS!
    - Post-petition credit should be conditioned on Debtor's agreement not to deduct pre-petition credits and other related claims

## Debtor's Setoff Rights As A Defense To Section 503(b)(9) Priority Claims

- Proposed Contractual Fixes
  - “Buyer waives right to assert pre-petition credits, deductions, chargebacks, overpayments, rebates and similar claims if buyer is “not in good standing” with Seller (i.e., Buyer is past due or otherwise in default; out of business)”
  - “Buyer waives the right to assert any right of setoff, recoupment or any other defense with respect to any credits, deductions, chargebacks, overpayments, rebates and similar claims that Seller owes Buyer to reduce Buyer’s indebtedness to Seller”

## Debtor's Setoff Rights As A Defense To Section 503(b)(9) Priority Claims

- Proposed Contractual Fixes (continued)
  - “Seller shall be permitted to apply all credits, deductions, chargebacks, overpayments, rebates and similar claims owed to the Buyer in reduction of indebtedness owing by the Buyer to Seller as determined by Seller at its sole discretion.” [e.g., apply credits against oldest invoices first]
  - Enforceability of proposed provisions on screens 53 and 54 in bankruptcy?
    - Note following caveat in AWI opinion:

“...I conclude that there is a presumption that the claimants’ prior course of dealing, industry standards and *contract* do not operate as a waiver of the Debtors’ equitable remedies. However, if a claimant believes that its course of dealing or contractual language provide a good faith basis for arguing that the Debtors have waived their equitable remedies, then the claimant shall have the right to a hearing on the merits of their claim to rebut the presumption.”

### Another Litigated Issue: Preference Claim As a Defense to Section 503(b)(9) Administrative Priority Claim

- Courts are Divided
- Some Courts Have Rejected Preference Claim As Grounds for Disallowance of Section 503(b)(9) Priority Claim
- Other Courts Have Allowed Debtors to Assert Preference Claim as Basis for Temporarily Disallowing Section 503(b)(9) Priority Claim

### One Of Section 503(b)(9)'S Litigated Issues: Meaning Of Receipt Of Goods

- Section 503(b)(9) does not define "Receipt"
- Actual Possession (UCC)?
  - UCC-2(103)(1)(c)
    - "Receipt of goods means taking physical possession of them"
- Constructive Possession?

## One Of Section 503(b)(9)'S Litigated Issues: Meaning Of Receipt Of Goods

- Drop Shipment?
  - Creditor ships goods to third party at Debtor's instruction
    - Debtor's agent
    - Debtor's customer
  - Debtor lacked actual physical possession of goods

## Receipt Of Goods – Drop Shipment

- In re *Plastech Engineered Products, Inc.*;  
Drop Ship Case
  - Section 503(b)(9) requires that a Debtor receive the goods and not just the value of such goods
  - Court did not decide whether receipt includes Debtor's "constructive receipt" of goods through receipt by third party
  - Parties subsequently settled on terms favorable to seller

## Receipt Of Goods: Drop Shipment

- *In re Momenta, Inc.* – U.S. District Court New Hampshire affirming U.S. Bankruptcy Court Decision—
  - Receipt includes buyer’s physical or constructive possession of goods
  - Buyer does not obtain constructive possession of goods that are delivered to buyer’s customer under drop shipment arrangement
  - Constructive possession narrowly interpreted to occur upon proof of receipt of goods by buyer’s agent
  - Adopted Black’s Law Dictionary definition of “drop shipment delivery” as a “manufacturer’s shipment of goods directly to the consumer rather than initially to a wholesaler”

## Receipt Of Goods: Drop Shipment

- *In re World Imports* – U.S. Bankruptcy Court, Eastern District of Pennsylvania
- Creditor “Drop Shipped” Goods to Debtor’s Customers
- Followed *Momenta* Decision In Holding That Debtor Did Not Receive Drop Shipped Goods
- Creditor’s Section 503(b)(9) Priority Claim re Drop Shipped Goods Denied

## Receipt Of Goods: Drop Shipment

- Can “Receipt” Be Defined in Parties’ Agreement to Occur Upon Buyer’s Customer’s Receipt of the Goods?
- Suggested Language: “Receipt of any product by buyer shall immediately occur when buyer, buyer’s bailee or other agent or designee receives either actual or constructive possession of such product. Constructive possession shall include, without limitation, receipt by an entity or individual (including, without limitation, buyer’s customer) pursuant to a drop ship instruction or other delivery instructions from buyer. Constructive possession specifically does not require actual possession by the buyer.”

## Is There A Different Meaning For Receipt Re Goods Shipped From Abroad?

- *In re World Imports, Ltd.* – Bankruptcy Court, Eastern District of Pennsylvania
- Court Held Receipt Occurs When Goods Are Loaded On Carrier
- Court Relied on
  - CISG – Convention on Contracts for International Sale of Goods
  - Incoterms
    - One of Incoterms is FOB – Free on Board



## Is There A Different Meaning For Receipt Re Goods Shipped From Abroad?

- Court Held Buyer Received Goods When They Were Loaded on the Carrier More than 20 Days Before Bankruptcy Filing Based on FOB Port of Origin Terms
- Court Relied on Definition of FOB
  - “[means that the *seller delivers* the goods on board the vessel nominated by the buyer at the named port of shipment or procures the goods already so delivered. The *risk of loss of or damage to the goods passes when the goods are on board the vessel*, and the buyer bears all costs from that moment onwards.”
- Court Also Relied On How FOB Describes Delivery
  - “[T]he seller must deliver the goods either by placing them on board the vessel nominated by the buyer at the loading point, if any, indicated by the buyer at the named port of shipment or by procuring the goods so delivered. In either case, the seller must deliver the goods on the agreed date or within the agreed period and in the manner customary at the port.”

## Protecting Security/Consignment Interests When Debtor Files Bankruptcy

- Prerequisites for Valid, Perfected and Priority Security Interest or Consignment On Bankruptcy Filing Date
  - Signed security agreement granting security interest in specified collateral or consignment agreement
  - UCC filing describing collateral or consigned goods in state where debtor is “located”
  - Must identify Debtor by correct legal name
  - Does not require debtor’s signature
- Priority Rules
  - First to perfect wins
- Exception to Priority Rules
  - Obtaining superpriority status for purchase money security interests and consignments

## Protecting Security/Consignment Interests When Debtor Files Bankruptcy

- Purchase Money Security Interest (“PMSI”)
  - Security interest granted to seller of goods to secure purchase price
- UCC Article 9 Rules for Superpriority Status Over Existing Secured Creditor
  - PMSI Security Agreement signed or authenticated by Debtor
  - Equipment
    - UCC filing within 20 days of receipt by Debtor
  - Inventory
    - UCC Filing before Debtor’s receipt of goods
    - Authenticated written notification to prior secured inventory creditors
    - Good for 5 years

## Consignment

- Delivery of Goods Having a Value of At Least \$1,000 to Merchant for Sale Provided:
  - No security interest created in consigned goods
  - Goods not consumer goods prior to delivery; and
  - Merchant deals in goods of that kind under name other than that of consigner, is not auctioneer and is not generally not known by creditors to be substantially engaged in selling goods of others

## Consignment

- A Transaction Where a Vendor, Consignor, Delivers Goods to a Buyer, Consignee, for Sale or Use:
  - Vendor/consignor retains title to goods until the buyer/consignee either sells or uses the goods
  - Generally, consignor issues an invoice, containing payment terms, to the consignee after consignee's reported sale or use
  - Requires UCC filing and compliance with UCC Article 9
  - Priority over prior perfected security interest in inventory by following UCC Article 9 PMSI rules for superpriority status
    - Signed consignment agreement
    - UCC Filing before consignee's receipt of goods
    - Authenticated written notification to prior secured inventory creditors
      - Good for 5 years

## Purchase Money Security Interest/ Consignment – Risks to Consignor

- Unperfected Consignment No Better Than Unsecured Open Account Sales
- Failure to Follow UCC Article 9 Requirements For Obtaining Priority Status In Purchase Money and Consigned Goods
  - Consignee/Buyer's secured creditor with a prior perfected blanket security interest in buyer's/consignee's inventory has superior interest in purchase money/consigned goods
- Need to Monitor Buyer/Consignee For Name Change, Merger, Change in Business Structure
- Must Monitor/Verify Buyer/Consignee Sales and Payments
- Must Monitor Location of Purchase Money/Consigned Goods
- Must Be Able to Identify Purchase Money/Consigned Goods

## Risks to Purchase Money Secured Creditor/Consignor

- Purchase Money Security Interest/Consignment May Violate Buyer's/Consignee's Agreement With Secured Lender
  - At minimum, reduces availability under buyer's/consignee's loan facility
- Only Covers Future Shipments After Perfection, Not Prior Shipments
- Priority Status
  - Applies to only identifiable purchase money/consigned goods and "identifiable cash proceeds"
  - Does not apply to accounts as proceeds

## Protecting Security/Consignment Interest In Goods And Other Collateral When Debtor Files Bankruptcy – Automatic Stay

- Automatic Stay Prevents a Secured Creditor From:
  - Collecting pre-petition claim
  - Recovering goods and other collateral subject to security interest
  - Unless the secured creditor obtains relief from the stay from the Bankruptcy Court

## Protecting Security/Consignment Interest In Goods And Other Collateral When Debtor Files Bankruptcy

- Section 552 – Post Petition Effect of Security Interest
  - (a) Security interest arising under pre-petition security agreement does not extend to debtor's post-petition assets
  - (b) Security interest arising under pre-petition security agreement extends to collateral in debtors' possession on petition date and to proceeds, products, offspring or profits
- Risk of Debtor's Use of Secured/Consigned Creditor's Goods and other Collateral in its Business Operations
- Risk of Loss of Security/Consignment Interest Based on Debtor's Use of Collateral/Cosigned Goods Post-Petition

## Protecting Interest In Goods And Other Collateral When Debtor Files Bankruptcy

- Given Cooperative Chapter 11 Debtor
  - Secured or consignment status should be retained in bankruptcy
  - Security/Consignment Interest in post-petition assets and priority status preserved by Debtor's paying for the goods or granting priority over Chapter 11 lender providing DIP/Chapter 11 Financing or agreeing to Debtor's use of cash collateral
  - Bankruptcy court approval required

## Protecting Interest In Goods And Other Collateral When Debtor Files Bankruptcy

- Given Non-Cooperative Chapter 11 Debtor
  - Secured/Consignment creditor should seek Bankruptcy Court approval for relief from the automatic stay to recover goods and other collateral subject to security interest
  - Secured creditor should object to proposed chapter 11 DIP financing/use of cash collateral arrangement and seek “adequate protection” for Debtor’s use of the goods and other collateral and proceeds
    - Payment for goods subject to PMSI/Consignment on filing date
    - Senior security interest in new goods sold/consigned to Debtor

## Recent Consignment Issues In Bankruptcy: *The Sports Authority Case*

- Sports Authority Case Dealt With Consignments
- Most of Sports Authority’s Inventory was Consigned Goods
- 170 Consignment Vendors
- Only a Handful of Consignment Vendors Had Validly Perfected Priority “Security Interests” in the Consigned Goods and Gave Required Notice for Priority Status
- Sports Authority Commenced Adversary Proceedings Against Each Consignment Vendor To Void Alleged Consignment Interest
  - Sports Authority’s Term Lenders intervened in each adversary proceeding

## Sports Authority Consignment Issues

- Sports Authority Sought to Sell Consigned Goods and Escrow Payments for Consignment Vendors
  - Consignment vendors objected insisting that consignment vendors were to be paid from sale proceeds
  - Objection by Term Lenders
- Court Granted Debtors' Motion to Sell Consigned Goods and Directed Payment to Consignment Vendors Pursuant to terms of Consignment Agreements
- Term Lenders Appealed and Sought Stay of the "Consignment Order"
- Both Bankruptcy Court and United States District Court Denied Term Lenders' Request for a Stay
- Consignment Vendors Appealed as Well

## Sports Authority Consignment Issues

- Sale Under 11 U.S.C. 363 of Debtors' Assets Continued While Appeals by Term Lender and Consignment Vendors were Ongoing
- Appeals Sent to Mediation
- Consignment Issues Settled

## Sports Authority Consignment Issues

- Consignment Settlement Terms:
  - Most consignors received between 25% - 40% of the proceeds of the sale of their consigned goods due under their consignment agreements
    - A few consignors received 45% - 50% of proceeds due under their agreements
  - Release of preference claims against settling consignors

## Trade Creditors' Setoff Rights

- Right of Creditor to Credit Amount Owed to Debtor Against Any Amount Debtor Owed Creditor
- Creditor Self Help Measure
- Example: Prior to Debtor's Bankruptcy Filing:
  - Creditor provided goods on credit to Debtor with respect to which Debtor owes \$50,000 to creditor
  - Debtor provided services to creditor with respect to which Creditor Owes \$50,000 to Debtor
  - Setoff allows creditor to reduce creditor's pre-bankruptcy indebtedness to Debtor by creditor's pre-bankruptcy claim against Debtor for a net obligation of "0" owing by creditor to Debtor



## Trade Creditors' Setoff Rights

- State Law Right
  - Conditioned upon satisfying the following:
    - Obligation to be setoff must be Debtor's property
    - Existing indebtedness is due and owing; and
    - Mutuality of obligation between the Debtor and creditor
    - Debts must be between same parties
    - Both debts must be pre-petition or post-petition
- Avoids absurd and unfair result of making A pay B when B owes A

## Trade Creditors' Setoff Rights

- The Bankruptcy Code Does Not Grant Setoff Rights Per Se
- Bankruptcy Code §506(a) Treats Valid Setoff Rights as a Secured Claim
- Bankruptcy Code §553 Recognizes and Preserves Creditor's State Law Setoff Rights, But Also Limits a Creditor's Ability to Exercise its Setoff Rights
- Automatic Stay Arising Under Bankruptcy Code §362 Prevents a Creditor From Unilaterally Exercising Setoff Rights Subsequent to Debtor's Bankruptcy Filing
  - The creditor must obtain a bankruptcy court order granting relief from the automatic stay to permit setoff

## Triangular Setoff

- Risks
  - Creditor dealing with multiple affiliated debtors
  - A's obligations to Company B cannot be setoff against affiliated Company C's indebtedness to A, unless otherwise permitted by agreement between A, B, and C
    - Lacks mutuality – one of the requirements for setoff

## Triangular Setoff

- Following sample language for Setoff Agreement to allow Triangular Setoff:

“XYZ Papers Inc., and its direct and indirect affiliates, divisions and subsidiaries including, but not limited to, XYZ Papers Holdings Inc., XYZ Canada Inc., XYZ Limited and XYZ NH LLC (hereinafter collectively “XYZ”) and ABC Inc. and its direct or indirect affiliates, divisions or subsidiaries including, but not limited to, ABC Inc. (collectively “ABC”) agree that notwithstanding anything to the contrary contained herein or contained in any other contract, agreement or document, XYZ may offset any debt owing by XYZ to ABC against any debt owing by ABC to XYZ.”

Note: The agreement, at least as to the paragraph above, must be signed by all ABC and XYZ entities that do business with each other.

## Triangular Setoff

- Southern District of New York and Delaware Decisions Rejected Contractual Triangular Setoff Provision as Unenforceable in Bankruptcy
  - *In re Lehman Brothers Inc.*, U.S. Bankruptcy Court, Southern District of New York
  - *In re SemCrude, L.P.*, U.S. Bankruptcy Court, District of Delaware, Affirmed by U.S. District Court, Delaware
  - *In re American Home Mortgage Holdings, Inc.*, U.S. Bankruptcy Court, District of Delaware
- Court Decision Rejecting Substantive Consolidation of Affiliated Debtors' Estates as Basis for Triangular Setoff
  - *In re Garden Ridge Corporation*, U.S. District Court, Delaware, Affirmed by U.S. 3<sup>rd</sup> Circuit Court of Appeal

## Secured Lender vs. Trade Creditor Setoff Rights

- UCC Section 9-404 States that a Lender's Security Interest in Customer's Accounts Receivable Cuts Off Setoff Rights of a Trade Creditor of the Customer If Lender or Customer Provides Notice of Security Interest to the Creditor
- Unresolved Question. Whether Trade Creditor Received Sufficient Notification of Security Interest By Prior Receipt of a Dun & Bradstreet or Other Credit Report Containing Information re Security Interest?
  - Courts divided

## Executory Contracts

- Contracts Under Which Performance is Still Required to Some Extent by Both Sides and Failure to Perform by Either Side is Material Breach Excusing the Other's Performance
  - Supply Agreement
  - Consignment Agreement
- Section 365 of the Bankruptcy Code governs assumption (including followed by assignment) and rejection of executory contracts and leases
  - Court approval required

## Executory Contracts

- Non-Debtor Parties Must Perform Under Executory Contracts Until they are Assumed or Rejected
  - Seller/Consignment creditor required to continue selling/consigning goods to debtor
  - Is non-debtor obligated to continue extending credit post-petition if required by contract?
    - Contract terms and/or UCC credit remedies (adequate assurance/stoppage of delivery) might permit
  - Risk of switch to cash in advance
    - Breach of contract claim
    - Violation of automatic stay

## Executory Contracts

- Assumption, Rejection and Assignment Require Court Approval, and Assignment Often Is Part of the Sale of the Debtor's Business and/or Assets
- Time Frame for Assumption/Rejection of Most Executory Contracts
  - Any time prior to or upon confirmation of plan
  - Non-debtor party can seek to shorten period by moving in bankruptcy court compelling debtor to assume/reject contract within specified time period, and/or seeking adequate protection (*e.g.*, deposit, letter of credit or cash in advance terms)
    - Very difficult to obtain early in case

## Executory Contracts

- Profitable Contracts are Assumed/Assigned
  - Cure of all arrears and defaults
  - Adequate assurance of future performance by Debtor or Assignee
- Unprofitable/Burdensome Contracts are Rejected
  - Creditors are entitled to assert a contract rejection damages unsecured claim and stop performing
  - Creditors are entitled to assert an administrative priority claim for goods delivered post-petition

## Unenforceability of “Ipso Facto Clauses”

- Ipso Facto Clause Unenforceable in Bankruptcy
  - Modifies/terminates contract upon insolvency/poor financial condition, including customer’s bankruptcy
  - “Safe Harbor” exception

## Creditor Can Force Issue

- Motion to Compel Assumption or Rejection
- 11 U.S.C. §365(d) provides:
  - On request of any party to contract
  - Court may order the trustee/debtor to determine within specified period of time to assume or reject such contract
- Creditor Can Also Seek Adequate Protection
  - Deposit
  - Letter of Credit
  - Cash in Advance Terms

## Advantages Of “Forcing The Issue”

- Debtor’s Quick Assumption of Contract (rare!)
- Debtor’s Payment of Post-Petition Claims
- Debtor May Agree to Release Creditor From Contract
- Creditor May be Able to Negotiate More Favorable Terms
- Debtor May Agree to Deadline for Assumption/Rejection

## Unilateral Action Dangerous

- Creditor’s Failure to Fulfill Terms of Any Executory Contract Risks Debtor’s Assertion of Claims of Breach of Contract and Violation of Automatic Stay

## Creditors' Committee

- What is it?
  - Representative of entire unsecured creditor body
  - Comprises Debtor's largest unsecured creditors
  - May include:
    - Bondholders
    - Trade creditors
    - Labor
    - PBGC
    - Landlord

## Creditors' Committee

- Section 1102 of the Bankruptcy Code:  
*...as soon as practicable...the United States trustee shall appoint a committee of creditors holding unsecured claims...*  
  
*A committee of creditors appointed...shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee...*



## Creditors' Committee

- Members of the Committee are Fiduciaries and Represent the Entire Unsecured Creditor Body.
- A Creditors' Committee Should Attempt to Maximize Recovery for all Unsecured Creditors.
- Opportunity to Shape Progress and Outcome of Case
  - Evaluate Debtor's decisions and direction
  - Object to actions not in the unsecured creditors' best interests
  - Stay on top of Debtor's current financial condition

## Creditors' Committee – Selection Process

- List of 20 Largest Creditors Provided by Debtor
- Questionnaire Sent by Office of United States Trustee (UST) to Those Creditors Prior to Committee Formation Meeting, to Solicit Interest
- Any Creditor May Request a Questionnaire from the UST

## Creditors' Committee – Selection Process

- U.S. Trustee Questionnaire
  - Varies by jurisdiction
  - Amount and nature of claim
  - Counsel
  - Affiliation with debtor
  - Competitor
  - Section 503(b)(9) claim
  - Reclamation claim
  - Third party backstops
    - Credit insurance
    - Guaranty

## Creditors' Committee – Selection Process

- Formation / Organizational Meeting
  - Date set by the UST, usually within 2-4 weeks of filing (sometimes quicker)
    - Timing can be affected by nature of motions filed with the Court
  - Usually at UST's regional office
- Alternatively, the UST May Appoint a Creditors' Committee Without Calling a Meeting Based on Creditor Responses to UST Questionnaire

## Creditors' Committee – Selection Process

- In Attendance at Committee Formation Meeting
  - US Trustee
  - Debtor
  - Creditors
  - Attorneys
  - Financial advisors
- Creditors Can Attend The Meeting By Proxy, but Be Careful!

## Creditors' Committee – Selection Process

- Committee Formation Meeting (cont'd)
  - Introduction by US Trustee
  - Explanation of the role of the UST and the Creditors' Committee
  - Brief presentation by Debtor
  - UST interviews creditors
  - Selection of Creditors' Committee

## Creditors' Committee – Selection Process

- The UST selection process is based on:
  - Value
    - The Code allows for appointment of a creditor with a small claim, who is suffering disproportionately by the Debtor's filing
  - UST considers unique skills, prior committee experience and knowledge of industry
  - Diverse Interests
    - Representative of all unsecured creditors

## Creditors' Committee – Costs

- Members' time
- Expenses
  - Section 503 of the Bankruptcy Code allows that members of a Creditors' Committee to receive court-approved reimbursement of all out-of-pocket expenses incurred due to their participation
  - Primarily travel costs (transportation, hotel, meals)
- Access to Committee Professionals

## Creditors' Committee – Initial Decisions

- Selection of Chairperson
- Discussion of Committee Objectives
- Interview and Selection of Professionals, if Appropriate
  - Counsel
  - Financial Advisors
    - Accounting
    - Turnaround professionals
    - Investment bankers
- Adoption of By-Laws – Govern Committee Member Conduct

## Creditors' Committee – To Serve or Not to Serve

- Does Creditor Want to be Part of the Process?
  - Is this customer important to creditor's business?
  - Is the outstanding debt significant to creditor's business?
- Does Creditor Have the Time and Ability?
- Can Creditor Make a Difference?

## Creditors' Committee – Powers and Duties

- Investigates the Acts and Financial Affairs of the Debtor
- Consults with the Trustee or Debtor Concerning Administration of the Case
- Involvement Chapter 11 Financing/Use of Cash Collateral
- Involved in 363 Sale of Business Assets
- Participation in Formulation/Negotiation of Chapter 11 Plan
- Requests Appointment of a Chapter 11 Trustee based upon Debtor Misconduct

## Creditors' Committee – Role of Committee

- The Committee's Involvement and Role Varies on a Case by Case Basis.
- Immediate Priority – First Day Motions
  - DIP Financing
    - Prevent DIP lender/pre-petition secured lender from obtaining interest in right to recovery on preference claims
  - Use of cash collateral
  - Protect section 503(b)(9) priority claims in administratively insolvent case
  - Sale process and timing
  - Critical vendor motions
  - Employee wages and benefits
  - Lease rejections

## Creditors' Committee – Role of Committee

- Depends on the Direction a Case is Taking
- Reorganization
  - Review business projections to determine viability
    - Focus on core business
    - Shed non-core assets
    - Exit from unprofitable contracts
  - Assist in formulating plan of reorganization with Debtor and its advisors
  - File own plan of reorganization?

## Creditors' Committee – Role of Committee

- Sale
  - Evaluate proposed sale process and timing
  - Assist in finding going concern potential buyers
  - Participate in evaluation of offers from interested parties
  - Attend and participate in auction(s)
- Liquidation
  - Participate in selection of liquidators, if appropriate
  - Attend and participate in auction(s)
- Assist in Selecting Liquidating Trustee Appointed Under Plan of Liquidation
- If Sufficient Funds are Available, Advisory Committee, Consisting of Committee Members, Works with Liquidating Trustee

## Creditors' Committee - Investigation

- The Extent of the UCC's Investigation will Often Depend on Funding, Available Claims, and Likelihood of Recovery to Unsecured Creditors
- Preference Claims
- Fraudulent Transfers
- Insider Transactions
- Review of Liens, Security Interests and Mortgages
- Secured Lender Transactions
- Solvency Analysis
- Potential Claims Against Officers and Directors
- Claims Against Former Owners

## Preference: Elements Of Claim

- Any Transfer of an Interest of the Debtor in Property;
- To or for the Benefit of a Creditor;
- For or on Account of an Antecedent Debt Owed by the Debtor Before Such Transfer Was Made;
- Made While the Debtor was Insolvent;
  - On or within 90 days before bankruptcy filing; or
  - Between 90 days and one year before bankruptcy filing for transfers to insider creditors; and
- That Enables Such Creditor to Receive More Than Such Creditor Would Receive if:
  - The case were a Chapter 7 case
  - The transfer had not been made
  - Such creditor received payment to the extent provided by other provisions of Title 11
  - The greater than liquidation recovery requirement



## Preference Elements

- Letter of Credit Payment Not From Property of Debtor
- Debtor's Payment by Credit Card is From Property of Debtor
- Cash-In-Advance Payment Not a Preference
  - No antecedent debt
- Creditor Fully Secured by Debtor's Assets or Paid from Collateral Proceeds Not Subject to Preference Risk
- Creditor Whose Executory Contract Was Assumed by Debtor Not Subject to Preference Risk
- Preference Checklist, Tab 6 of Supplement

## Preference Defenses: Contemporaneous Exchange For New Value (COD)

- Transfer was *Intended* by Debtor and Creditor to be Contemporaneous Exchange for New Value; and
- Transfer was Substantially Contemporaneous Exchange
- Examples:
  - COD transaction: check tendered for delivery of goods
    - Risk of bounced COD check; replacement payment not subject to this defense

## Preference Defenses: New Value

- Creditor Extending Credit to Debtor After Payment, that was Not Secured and Not Paid by Otherwise Unavoidable Transfer
- Goods Shipped/Services Provided on Credit Terms Following Payment Reduce Preference Exposure
- New Value Cannot Be Applied to Subsequent Payments

## Preference Defenses: Paid For New Value

- Paid for New Value May Count to Reduce Preference Exposure
- U.S. Circuit Courts of Appeal are Divided on Whether Paid New Value Counts, though Trend is Toward Allowing Paid New Value:
  - 4<sup>th</sup>, 5<sup>th</sup> and 9<sup>th</sup> say Yes!
  - 7<sup>th</sup> and 11<sup>th</sup> say No!
  - 3<sup>rd</sup> Circuit's prior "No" is now in question – Likely open
  - 8<sup>th</sup> goes both ways
  - Other Circuits Open – Yes and No

## Preference Defenses: Evolution Of Paid New Value Defense – 3<sup>rd</sup> Circuit

- U.S. Court of Appeals for 3<sup>rd</sup> Circuit, in *In re Friedman's*, Held Its Prior Statement in *New York City Shoes* that New Value Must Remain Unpaid Is Dicta and Not Binding
- Suggests 3<sup>rd</sup> Circuit is Open to Allowing Paid New Value

## Recent Delaware Decisions Allowing Paid For New Value

- *In re Proliance International Inc.*
  - 2014 Delaware Bankruptcy Court decision to allow paid new value as preference defense
    - Expanded new value defense by allowing paid new value without regard to the applicability of other preference defenses to the paid new value
- *In re Pillowtex Corporation*
  - 2009 Delaware Bankruptcy Court decision that also allowed paid new value

## Critical Vendor Preference Risk

- Does Critical Vendor's Receipt of Post-Petition Payment of Pre-Petition Claim Result in Loss of Section 547(c)(4) New Value Defense to Preference Claim?
  - Yes and No!
  - U.S. Court of Appeals 3<sup>rd</sup> Circuit Decision – *In re Friedman's* counts new value paid post-petition pursuant to court order because new value is determined as of bankruptcy filing date
  - Other courts have disqualified new value paid post-petition
  - Suggestion: Critical vendor order should either release preference claims against vendor or preserve new value defense

## Is Paid Section 503(b)(9) Claim Eligible As New Value?

- Yes: *In re Commissary Operations, Inc.* U.S. Bankruptcy Court, Middle District of Tennessee
  - New value window closes on bankruptcy filing date (same ground cited by 3<sup>rd</sup> Circuit court in *In re Friedman's*)
  - New value defense not impacted by post-petition payments of new value
  - Section 503(b)(9) claims impaired if excluded from new value defense

## Paid Section 503(b)(9) Claim Is Not Eligible As New Value

- No: *In re Circuit City Stores* (U.S. Bankruptcy Court, Eastern District of Virginia) and *In re TI Acquisition LLC* (U.S. Bankruptcy Court, Northern District of Georgia)
- Paid Section 503(b)(9) Priority Claim Does Not Satisfy Section 547(c)(4)'s Requirement That "The Debtor Did Not Make An Otherwise Unavoidable Transfer To or For the Benefit of Such Creditor"
- Creditor Gets a Double Dip If It Can Use Fully Paid/Funded Section 503(b)(9) Claim As Part Of Its New Value Defense

## New Value Defense



### Practice Pointers



- First defense to consider, as on a stand-alone basis it's purely quantitative; not subject to debate over what is "ordinary."
- Can be used in conjunction with the other defenses, so long as there is no "double-dipping."
- Argue that new value counts whether paid or unpaid.
- Argue that new value counts even if paid for post-petition.
- When given an opportunity to negotiate (i) treatment as critical vendor, or (ii) claim under section 503(b)(9), obtain debtor's agreement, approved by the bankruptcy court, that post-petition payments do not hinder new value defense.

## Ordinary Course Of Business Preference Defense

- Transfer Was in Payment of a Debt Incurred by the Debtor in the Ordinary Course of Business or Financial Affairs of the Debtor and the Creditor; and
- Subjective Test – Made in the Ordinary Course of Business or Financial Affairs of the Debtor and the Creditor; OR
- Objective Test – Made According to Ordinary Business Terms
- Creditor Can Choose Most Beneficial (Subjective or Objective) Prong of Ordinary Course of Business Defense

## Subjective Component of Ordinary Course of Business Defense

- Courts Have Been Inconsistent and Unpredictable in Applying Subjective Component of Ordinary Course of Business Defense
- Each Side Can Pick a Methodology to Support its Position
- Encourages Expensive Litigation

## Ordinary Course of Business: Subjective – Litigated Issues

- Range of Views
  - How long of a payment history?
    - 1 Year?
    - 2 Years? U.S. Bankruptcy Court, Southern District, New York decision: *Quebecor World*
    - Longer?

## Ordinary Course of Business: Subjective – Baseline for Comparing Preference vs. Prior Payments

- Range of Payments
  - All payments? [*American Home Mortgage* Bankruptcy Court decision in Delaware]
  - Modified range? [*Philadelphia Newspapers* Bankruptcy Court decision in Eastern District, Pennsylvania]
  - Payments only when Debtor is healthy? [*Circuit City* Bankruptcy Court decision in Eastern District, Virginia]
- Bucket Analysis – Examining Payments by Grouping – Accepted – *Quebecor World*, U.S. Bankruptcy Court, Southern District of New York
  - Risk of skewed analysis

## Ordinary Course of Business: Subjective – Baseline for Comparing Preference vs. Prior Payments

- Comparison of Average Days to Pay/Days Late Prior to and During Preference Period
- *Archway Cookies* Bankruptcy and District Court decisions in Delaware –
  - Payments subject to subjective ordinary course defense, notwithstanding approximately 5 day difference in average days to payment during historical period (42.3 days) compared to preference period (47.2 days)
- *Quebecor World*, U.S. Bankruptcy Court, Southern District of New York -
  - 30 days off average [27.56 average days outstanding prior to preference period vs. 57.16 average days outstanding during preference period] too much
    - Straight or weighted average?

## Recent Ordinary Course of Business Defense – Subjective Component Decision: *In re Conex Holdings LLC* Bankruptcy Court Delaware

- Summary Judgment Granted Dismissing Preference Complaint Based on Subjective Ordinary Course Defense
- Length of Payment History Prior to Preference period
  - Okayed 16 month payment history prior to preference period



## Recent Ordinary Course of Business Defense – Subjective Component Decision: *In re Conex Holdings LLC* Bankruptcy Court Delaware

- Consistency of Timing of Payments During and Prior to Preference Period
  - Average days to pay from invoice date
    - Okayed 2 day difference in average days to pay [56 days prior to preference period vs. 54 days during preference period] when excluding outlier payments prior to preference period
    - Okayed 7 day difference in average days to pay [61 days prior to preference period vs. 54 days during preference period] when including outliers and all other historical payments prior to preference period

## Recent Ordinary Course of Business Defense – Subjective Component Decision: *In re Conex Holdings LLC* Bankruptcy Court Delaware

- Consistency of Timing of Payment During and Prior to Preference Period (*cont'd*)
  - Court also rejected trustee's dollar-weighted days (DSO) analysis
    - Contrary view: *In re Sparrer Sausage Company*: Bankruptcy Court Northern District of Illinois decision relied on weighted average days to payment
- No Change in Manner, Method and Circumstances of Payment of Alleged Preferences Compared to Prior Payments

# Recent Ordinary Course of Business Defense – Subjective Component Decision: *In re Conex Holdings LLC* Bankruptcy Court Delaware

## DEFENDANT’S METHODOLOGY FOR COMPARING PAYMENTS PRIOR TO AND DURING PREFERENCE PERIOD

	Average Days to Pay	Average Range of Days to Pay	Median
Historical Period (actual)	61	41–95	62
Historical Period (excluding 4 outliers)	56	41–70	55
Preference Period	54	41–68	55

# Recent Ordinary Course of Business Defense – Subjective Component Decision: *In re Conex Holdings LLC* Bankruptcy Court Delaware

## TRUSTEE’S METHODOLOGY FOR COMPARING PAYMENTS PRIOR TO AND DURING PREFERENCE PERIOD

	Dollar-Weighted Days Sales Outstanding (“DSO”) Analysis	Percentage of Invoices Paid Within 70 days of the Invoice Date
Historical Period (actual)	79.0	38.09%
Preference Period	60.6	100%

### Recent Ordinary Course of Business Defense – Subjective Component Decision: *Candy Fleet LLC v. Goodman*, United States District Court, Western District Louisiana

- Relied on 16 Month Historical Payment Period When Debtor Had Adequate Capital
  - Average days to pay – 14.6 days
- Average Days to Pay During Preference Period – 22.5 Days
  - Almost 50% increase – Did Not Support Subjective Ordinary Course Defense
- Court Did not Consider Additional 8 Month Payment History Immediately Prior to the Preference Period – Average Days to Pay Increased to Approximately 112 Days
- Court Limited Historical Payment Period to When Debtor was Adequately Capitalized
- Shades of *Circuit City*?

### Recent Ordinary Course Defense – Subjective Component Decision

- *Sparrer Sausage Co.* – 7<sup>th</sup> Circuit U.S. Court of Appeals Decision
  - 7<sup>th</sup> Circuit rejected Bankruptcy Court’s use of historical (pre-preference period) baseline of only 64% of invoices paid
  - Court accepted historical baseline of 88% of invoices paid (more generous to creditor)
  - Did not overturn Bankruptcy Court’s refusal to consider payments within 7 months of start of preference period

**Recent Ordinary Course of Business Defense – Subjective Component Decision: *In re Affiliated Foods Southwest Inc.* (U.S. 8th Circuit Court of Appeals)**

- Summary Judgment Dismissing Preference Claim Based on Subjective Ordinary Course Defense
- Length of Time Parties Did Business
  - 2 years prior to preference period (rejecting 1 year period)
  - Period could vary by case
- Consistency of Timing of Payments – Preference vs Prior Payments
  - Days to pay from invoice date
  - Preference Payment – 26 days from invoice date consistent with 35.43 average days to pay prior to the preference period

**Very Recent Ordinary Course of Business Defense – Subjective Component Decision: *In re Sierra Concrete Design Inc.*; United States Bankruptcy Court, Delaware**

- Defendant Proved Subjective Ordinary Course of Business Defense After Trial
  - Did not matter that debtor paid invoices 27.9 days faster during preference period
    - Average days-to-pay prior to preference period was 55.22 days
    - Average days-to-pay during preference period was 27.3 days

## First Time Transactions May Fall Within Subjective Ordinary Course of Business Defense

- Recent Decision of U.S. Court of Appeals for 10<sup>th</sup> Circuit – *In re C.W. Mining Co.*
  - Payment on account of first time transaction between debtor and creditor might satisfy the subjective part of ordinary course of business defense
    - Payment made 2 days before due date (within terms)
    - No evidence of creditor collection activity
- 6<sup>th</sup>, 7<sup>th</sup> and 9<sup>th</sup> Circuits Agree

## Subjective Ordinary Course of Business Preference Defense – Facts That Defeat Subjective Ordinary Course of Business On the Numbers

- Consistency In Timing of Payments Prior to and During Preference Period Alone Might Not Be Sufficient to Prove Subjective Component of Ordinary Course of Business Defense
- Threats to Subjective Component
  - Change in the form of payment during preference period (regular check to wire)
  - Change in method of invoicing (electronic to paper)
  - Change in credit terms
  - Imposition of credit limit/enforcement of existing credit limit
  - Threats to stop shipment; imposition of credit holds
  - Change in mode of delivery (regular mail to Federal Express)

## Proving Subjective Component of Ordinary Course of Business Defense



### Practice Pointers



- Use the Look Back Period that Works Best for You (e.g. One Year, Two Year, Entire History, Skip the Period Immediately Prior to the Preference Period When the Debtor was Unhealthy?)
- Use the Methodology that Works Best for You (e.g. Range of Days to Pay Created From Reasonable Deviation off the Historical Average, Modified Range Excluding Outliers, Comparing Averages, Bucket Analysis)
- Beware of the Risk of Adverse Impact of Changes, Pressure and/or Threats on the Subjective Ordinary Course Defense

## Ordinary Course Of Business Preference Defense – Ordinary Business Terms Alternative: Objective Component

- Proof Requirement Is Currently Evolving
- General Standard? Transfer Was Not So Unusual or Idiosyncratic As To Render It An Aberration In The Relevant Industry
- Which Industry to Consider?
  - Creditor's industry?
  - Debtor's industry?
  - Industry based on companies similar to creditor selling to companies similar to Debtor?
  - General business standards/sound business practice?

## Ordinary Course Of Business Preference Defense – Ordinary Business Terms Alternative: Objective Component

- Includes Range of Industry Terms
  - No need to prove single set of business terms within an industry
  - Ordinary Business Terms may vary widely across industries
- Creditor's Changing of Business Terms Does Not Necessarily Result in Loss of Objective Ordinary Course of Business Defense
  - Are new terms frequently used in industry?

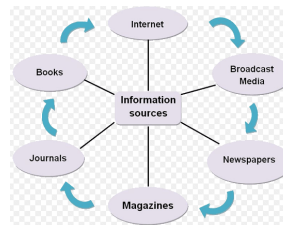
## Ordinary Course Of Business: Objective (Ordinary Business Terms)

- Proper Methodology For Determining A Payment's Consistency with Industry Practices is Evolving
- Example: *In re Waterford Wedgewood, Inc.* (Bankruptcy Court, Southern District of New York)
  - Proper method for determining whether a payment is made in accordance with ordinary business terms: whether payment occurred within one standard deviation of the industry average
- Contrast with *Hayes Lemmerz International Inc.* (Bankruptcy Court Delaware)
  - Court rejected expert testimony proffered by Trustee limiting industry practice to median range of payments for middle 50% of surveyed companies



## Ordinary Business Terms Information Sources

- Credit Research Foundation – National Summary of Domestic Trade Receivables
- Risk Management Association
- S&P Capital IQ
- D&B Industry Reports
- CreditRiskMonitor ([www.crmz.com](http://www.crmz.com))
- Trade Associations / Trade Credit Groups
- NACM Expert Witnesses
- American Society of Association Executives ([www.asaenet.org](http://www.asaenet.org))
- Thomson Reuters Expert Witness Services
- Outside expert witness services
- Lay witness with either:
  - Specific knowledge of industry practices, or
  - Objective information gained outside subjective experiences as employee of creditor/defendant.



## Ordinary Business Terms Defense



### Practice Pointers



- Independent. Ordinary Business Terms defense can be used on a stand-alone basis, and in conjunction with any other defense.
- Awareness. Be aware of credit and payment practices in your industry.
- Data. Develop industry information sources to support Ordinary Business Terms.
- Negotiations. Submit proof of ordinary business terms early in the negotiation process to: (i) separate you from the other defendants; and (ii) raise the stakes: plaintiff has to retain an expert.

## New Preference Defense

- Recent Delaware Bankruptcy Court Decision:  
*Quantum Foods*
  - Court approved, apparently for first time, a creditor's setoff of its unpaid allowed Chapter 11 administrative expense claim for goods sold and delivered post petition to reduce creditor's preference liability on dollar for dollar basis
  - Both creditor's administrative claim and preference claim against the creditor arose post-petition satisfying mutuality requirement for setoff
- Conflicting Holding Rejecting Setoff Preference Defense – 1984 *Georgia Steel Holding* – Bankruptcy Court, Middle District, Georgia

## Mediation

- Increased Frequency to Facilitate Settlement of Preference Actions
- Mandatory in some Courts (Per Bankruptcy Court Local Rules)
  - E.g., Delaware Bankruptcy Court Standing Order of April 7, 2004 as amended that requires mediation of all preference actions as follows:
    - Parties have 120 days after filing of answer to file mediation order
    - If parties fail to meet deadline, bankruptcy court appoints a mediator
    - Bankruptcy estate must pay mediator's fee and costs

## Mediation

- Many Courts Have Local Rules Allowing Mediation Subject to Court Approval
- Beware of Mediation Motions That Adversely Impact Preference Defendant's Position
  - Limits mediator choice to friends of trustee
  - Discovery stayed (pro and con)
  - Inconvenient location for mediation
  - Mandatory attendance at mediation
  - Penalty for non-attendance at mediation



## Questions?

**Bruce S. Nathan, Esq.**  
**Partner**

**Bankruptcy, Financial Reorganization  
& Creditors' Rights Group**  
**LOWENSTEIN SANDLER LLP**  
(212) 204-8686

[bnathan@lowenstein.com](mailto:bnathan@lowenstein.com)

[www.lowenstein.com](http://www.lowenstein.com)

[@BruceSNathan](https://twitter.com/BruceSNathan)



**Bruce S. Nathan**

Partner

Tel 212.204.8686 Fax 973.422.6851

E-mail: [bnathan@lowenstein.com](mailto:bnathan@lowenstein.com)

## Practice

Bruce S. Nathan, Partner in the firm's Bankruptcy, Financial Reorganization & Creditors' Rights Department, has more than 30 years' experience in the bankruptcy and insolvency field, and is a recognized national expert on trade creditor rights and the representation of trade creditors in bankruptcy and other legal matters. Bruce has represented trade and other unsecured creditors, unsecured creditors' committees, secured creditors, and other interested parties in many of the larger Chapter 11 cases that have been filed, and is currently representing the liquidating trust and previously represented the creditors' committee in the Borders Group Inc. Chapter 11 case. Bruce also negotiates and prepares letters of credit, guarantees, security, consignment, bailment, tolling, and other agreements for the credit departments of institutional clients.

Bruce was co-chair of the Avoiding Powers Committee that worked with the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 and also participated in ABI's Great Debates at their 2010 Annual Spring Meeting, arguing against repeal of the special BAPCPA protections for goods providers and commercial lessors, and was a panelist for a session sponsored by the American Bankruptcy Institute ("ABI") and co-sponsored by Georgetown University Law Center. Bruce also regularly speaks at conferences held by the National Association of Credit Management, its international affiliate, An Association of Executives in Finance, Credit and International Business ("FCIB"), Credit Research Foundation ("CRF"), and many credit groups on bankruptcy, insolvency, and creditor's rights issues; is a member of NACM's Government Affairs Committee, a regular contributor to NACM's *Business Credit*, a contributing editor of NACM's *Manual of Credit and Commercial Laws*, and co-author of *The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: An Overhaul of U.S. Bankruptcy Law*, published by NACM; and has contributed to CRF's Journal, *The Credit and Financial Management Review*.

Bruce is also a co-author of "Trade Creditor Remedies Manual: Trade Creditors' Rights under the UCC and the U.S Bankruptcy Code" published by the American Bankruptcy Institute ("ABI") at the end of 2011, has contributed to the *ABI Journal*, and is a former member of ABI's Board of Directors and former Co-Chair of ABI's Unsecured Trade Creditors Committee.

Bruce is recognized in the Bankruptcy & Creditor/Debtor Rights section of *Super Lawyers* (2012-2014) and in the 2014 *Super Lawyers Business Edition*. In March 2011, Bruce received the Top Hat Award, a prestigious annual award honoring extraordinary executives and professionals in the credit industry.

## Education

- **University of Pennsylvania Law School** (J.D., 1980)
- **Wharton School of Finance and Business** (M.B.A., 1980)
- **University of Rochester** (B.A., 1976), *Phi Beta Kappa*

## Affiliations

- New York State Bar Association
- American Bar Association
  - Commercial Financial Services Committee
  - Business Bankruptcy Committee
- American Bankruptcy Institute
  - Former Member, Board of Directors
  - Former Chair, Unsecured Trade Creditor Committee
  - Regular Contributor to *American Bankruptcy Institute Journal's* "Last in Line" Column
  - Speaker at 2007 Annual Spring Meeting: "Fifty Ways to Leave Your Debtor: Lesser Known Remedies For Jilted Creditors"
  - Panelist at "Chapter 11 At The Crossroads: Does Reorganization Need Reform?" A Symposium on the Past, Present and Future of U.S. Corporate Restructuring," on November 16-17, 2009, sponsored by ABI and co-sponsored by Georgetown University Law Center
  - Participated in the Great Debates at ABI's Annual Spring Meeting held on April 30, 2010 on whether Congress should eliminate the special BAPCPA protections for providers of goods and lessors (arguing against repeal)
  - Task Force on Preferences
  - Chair, Task Force on Reclamations
  - Uniform Commercial Code Committee and Task Force - Revised Article 9 Primer
- American Bankruptcy Institute's Commission to Study the Reform of Chapter 11
  - Co-chair, Avoiding Powers Advisory Committee
- Commercial Law League of America
- Association of Commercial Finance Attorneys
- National Association of Credit Management
  - Contributor to *Business Credit* - National Association of Credit Management Magazine
  - National Bankruptcy and Insolvency Group
  - Lecturer, National Association of Credit Management and Affiliates and Credit Groups on Bankruptcy, UCC Article 9, Consignments, Letter of Credit law and other credit-related issues
- Member of FCIB, an Association of Executives in Finance, Credit and International Business. Presented at **The 4th China International Credit and Risk Management Conference**, Shenzhen, China, September 21, 2007, and **FCIB Teleconference**, December 13, 2007, on key provisions of People's Republic of China's 2006 Law on Enterprise Bankruptcy, similarities to and differences with the U.S. Bankruptcy Code, and upcoming implementation challenges
- Media Financial Management Association
  - Member
  - Frequent Lecturer
  - Contributor to "The Financial Manager" on Creditors' Rights Issues
- Lecturer, Executive Enterprises Inc. the Bank Lending Institute and the Banking Law Institute on Commercial Loan Workouts & UCC Issues
- Past Contributor
  - *Credit Today*
  - *National Credit News*

## Articles/Interviews Featuring Bruce S. Nathan

- **Bruce S. Nathan is quoted in Business Credit, attributing the increase of prepackaged Chapter 11 cases as a response to changes in the bankruptcy code in 2005 and the recession in 2008.** *Business Credit*, June 2016
- **Bruce Nathan comments in NACM eNews regarding the U.S. Supreme Court's affirmance of the elimination of limits on creditors' ability to garner a spousal guarantee.** *NACM eNews*, March 24, 2016
- **Bruce S. Nathan is quoted in NACM eNews regarding the tenuous financial condition of certain large retailers, and the risks facing credit professionals in 2016 when making their credit decisions in sales to such retailers.** *NACM eNews*, January 21, 2016
- **Bruce S. Nathan is quoted in NACM eNews, predicting that the recent rate hike and future hikes by the Federal Reserve should increase the number of bankruptcy filings.** *NACM eNews*, December 17, 2015
- **Bruce S. Nathan is quoted in NACM eNews regarding the new official forms, including the new proof of claim form, used in bankruptcy cases, which became effective December 1.** *NACM eNews*, December 10, 2015
- **Bruce S. Nathan is quoted in NACM eNews concerning the increasing number of unsuccessful retail bankruptcy reorganizations.** *NACM eNews*, November 19, 2015
- **Bruce S. Nathan is quoted in NACM eNews regarding the risk of a future bankruptcy filing when a company buys a financially distressed company and in the process overleverages itself.** *NACM eNews*, November 12, 2015
- **Bruce S. Nathan is quoted in NACM eNews regarding the growing competition for retailers such as A&P and other independent retailers from big box retailers, including Walmart and Target.** *NACM eNews*, August 27, 2015
- **Bruce S. Nathan is quoted in NACM eNews concerning the potentially deleterious effects of navigating in and out of bankruptcy court too quickly.** *NACM eNews*, June 25, 2015
- **Bruce S. Nathan comments in NACM eNews regarding the Supreme Court's ruling that bankruptcy courts may not award attorneys' fees for work performed in defending their fee application in court.** *NACM eNews*, June 18, 2015
- **Lowenstein Sandler LLP Selected to Represent Official Committee of Unsecured Creditors of Gourmet Express** March 31, 2015
- **Bruce S. Nathan comments in the May 2014 Financier Worldwide Magazine on identifying early warning signs concerning a financially distressed customer and suggested steps vendors should take to mitigate their losses.** *Financier Worldwide Magazine*, May 2014
- **Lowenstein Sandler Retained as Unsecured Creditors' Counsel in Coldwater Creek Chapter 11 Case** April 25, 2014
- **Bruce S. Nathan is mentioned in Law360 in connection with his representation of the Official Committee of Unsecured Creditors of Coldwater Creek Inc.** *Law360*, April 25, 2014
- **Bruce S. Nathan was quoted in the National Association of Credit Management's eNews regarding claims against General Motors.** *NACM's eNews*, April 24, 2014
- **In NACM's eNews for December 12, 2013, Bruce Nathan comments on how the recent Supreme Court ruling regarding forum-selection clauses continues to allow opportunities for subcontractors in contract negotiations.** *NACM's eNews*, December 12, 2013

- In NACM's eNews for September 19, Bruce Nathan comments on how increased environmental regulations are putting financial strain on coal mines and causing many to shut down. *NACM's eNews*, September 19, 2013
- In NACM's eNews for August 29, Bruce Nathan comments on problems in the retail industry that are of growing concern to creditors including retailers that are overleveraged, have inadequately responded to e-commerce and made poor management decisions. *NACM's eNews*, August 29, 2013
- In NACM's eNews for August 22, Bruce Nathan comments on how the constitutionality of the Detroit bankruptcy... *NACM's eNews*, August 22, 2013
- Bruce Nathan comments on reasons for the decline of commercial Chapter 11 filings over the past year and prior years in NACM eNews, August 8, 2013. *NACM eNews*, August 8, 2013
- In NACM's e-News for July 25, Bruce Nathan comments on the complexity of Detroit's Chapter 9 bankruptcy filing, its effect on other cities facing the same problems as Detroit and its impact on trade creditors. *NACM's e-News*, July 25, 2013
- In The Deal Pipeline, Sharon L. Levin, Jeffrey Prol and Bruce Nathan are highlighted for representing the official committee of unsecured creditors in the Handy Hardware Wholesale, Inc. bankruptcy. *The Deal Pipeline*, June 21, 2013
- Bruce Nathan comments on how an MF Global Holdings Ltd. trustee's suit against Jon Corzine and other former MF Global Holdings officials for high-risk actions leading to the company's bankruptcy may lead to an additional recovery for creditors. *NACM's eNews*, April 25, 2013
- Bruce Nathan comments in NACM's eNews for April 18, 2013 on how interest rate hikes and high debts plaguing "big box" retailers may foreshadow bankruptcies in the industry and how anticipating bankruptcy helps mitigate creditors' risks. *NACM's eNews*, April 18, 2013
- In NACM's eNews, for April 4, 2013, Bruce Nathan comments on U.S. Bankruptcy Judge Christopher Klein's ruling that Stockton, California meets the threshold for eligibility on its Chapter 9 municipal bankruptcy petition. *NACM's eNews*, April 4, 2013
- Lowenstein Retained as Creditors' Counsel in Zacky Farms Chapter 11 Case October 19, 2012
- In an article on the National Association of Credit Management web site, Bruce Nathan comments on the Alabama Supreme Court's ruling to uphold Jefferson County's right to declare municipal bankruptcy in the largest Chapter 9 filing in U.S. history. *NACM ENews*, April 26, 2012
- On NACM.org, Bruce Nathan and Scott Cargill discuss the Lehman Brothers bankruptcy case. *NACM ENews*, December 8, 2011
- Bruce Buechler, Bruce Nathan and Paul Kizel are highlighted for representing the Official Unsecured Creditors Committee of Borders Group Inc *The Daily Deal*, August 11, 2011
- Bruce Nathan comments on how the debtor's right to choose the venue for Chapter 11 proceedings is part of the Bankruptcy Code's system of checks and balances between debtors' rights and creditors' rights. *Standard & Poor's LCD Distressed Weekly*, March 25, 2011
- Bruce Nathan, Bruce Buechler and Paul Kizel are highlighted for representing the Official Committee of Unsecured Creditors of Borders Group Inc *Westlaw News & Insight*, March 14, 2011
- Bruce S. Nathan discusses litigation surrounding creditors committee selection in light of recent changes to the U.S. Bankruptcy Code. *Dow Jones*, August 9, 2006

## Publications

- **"Court Ruling A Reprieve for Bankruptcy Reclamation Rights?,"** Bruce S. Nathan, David M. Banker, Barry Z. Bazian, *Business Credit*, November/December 2016
- **"Purchasing Claims Free and Clear of a Debtor's Defenses,"** Bruce S. Nathan, Scott Cargill, *American Bankruptcy Institute Journal*, October 2016
- **"Mind Your Ts and Cs (Terms & Conditions),"** Bruce S. Nathan, Lowell A. Citron, Chad S. Pearlman, *Business Credit*, September/October 2016
- **"A Little More You Need to Know About the "Ordinary Course of Business" and "New Value" Preference Defenses,"** Bruce S. Nathan, David M. Banker, Eric Chafetz, Barry Z. Bazian, *The Credit and Financial Management Review*, 3rd Quarter 2016
- **"Cautionary Tale for Section 503(b)(9) Claimants: Filing a Proof of Claim Might Thwart Recovery,"** Bruce S. Nathan, David M. Banker, *CRF News*, 3rd Quarter 2016
- **"A Preference Split Decision on the New Value and Ordinary Course of Business Defenses: Win Some, Lose Some!,"** Bruce S. Nathan, Eric Chafetz, *Business Credit*, July/August 2016
- **"Second Circuit Overturns Visa/MasterCard Antitrust Settlement,"** Bruce S. Nathan, Andrew David Behlmann, *NACM eNews*, July 7, 2016
- **"The Benefits of Properly Documenting a Consignment Transaction and the Potential For Recovery By Creditors that Don't!,"** Bruce S. Nathan, David M. Banker, Barry Z. Bazian, *CRF News*, 2nd Quarter 2016
- **"U.S. Supreme Court's Split Decision on Enforceability of Spousal Guarantee Limits,"** Bruce S. Nathan, *Business Credit*, June 2016
- **"Petitioning Creditor Eligibility to Join an Involuntary Bankruptcy Petition,"** Bruce S. Nathan, Eric Chafetz, *Business Credit*, May 2016
- **"The Timing of Receipt of Goods in International Transactions Could Be Hazardous to Section 503(b)(9) Priority Status,"** Bruce S. Nathan, Eric Chafetz, *Business Credit*, April 2016
- **"Social Media: The New Reality for Credit Professionals,"** Mary J. Hildebrand, CIPP/US/E, Bruce S. Nathan, Cassandra M. Porter, CIPP/US, *CRF News*, 1st Quarter 2016
- **"Spotting the Sinking Ships,"** Bruce S. Nathan, Kenneth A. Rosen, Scott Cargill, *The Financial Manager*, March/April 2016
- **"Letter of Credit Coverage of Preference Risk: Overcoming a Fraud Injunction,"** Bruce S. Nathan, Eric Chafetz, *Business Credit*, March 2016
- **"Petitioning Creditors Beware,"** Bruce S. Nathan, Eric Chafetz, *Business Credit*, February 2016
- **"More Shocking Developments on Whether Electricity is a Good Entitled to Section 503(b)(9) Administrative Priority Status,"** Bruce S. Nathan, Eric Chafetz, *Business Credit*, January 2016
- **"Rolling the Dice: Proving the Subjective Ordinary Course of Business Defense at Trial,"** Bruce S. Nathan, Eric Chafetz, *Business Credit*, December 2015
- **"Getting More from a Creditor's Committee,"** Bruce S. Nathan, Eric Chafetz, *CRF News*, 4th Quarter 2015
- **"The Hazards To Secured Status Caused by Minor Mistakes In A Security Agreement,"** Bruce S. Nathan, David M. Banker, *CRF News*, 3rd Quarter 2015
- **"Debtor Setoff Rights Can Endanger Recoveries on § 503(b)(9) Claims,"** Bruce S. Nathan, Scott Cargill, *American Bankruptcy Institute Journal*, October 2015
- **"Section 503(b)(9) Priority Claims Under Attack,"** Bruce S. Nathan, Scott Cargill, *Business Credit*, July/August 2015



- **"Involuntary Bankruptcy Petition Risk: Dismissal Can Be Costly to Petitioning Creditors,"** Bruce S. Nathan, Eric Chafetz, *Business Credit*, June 2015
- **"Electronic Signatures Agreements and Documents: The Recipe For Enforceability and Admissibility,"** Bruce S. Nathan, Terence D. Watson, *The Credit and Financial Management Review*, Second Quarter 2015
- **"Triumph over a Secured Lender,"** Bruce S. Nathan, Eric Chafetz, *Business Credit*, May 2015
- **"Joint Check Agreement Does Not Cut the Mustard to Avoid Preference Liability,"** Bruce S. Nathan, David M. Banker, *Business Credit*, April 2015
- **"Delaware Bankruptcy Court Grants Summary Judgment Dismissing Preference Complaint Based on Ordinary Course of Business Without a Trial,"** Bruce S. Nathan, David M. Banker, *Business Credit*, March 2015
- **"Creditors Beware: Post-Petition Standby Letter of Credit Payments May Reduce New Value Defense,"** Bruce S. Nathan, Eric Chafetz, *Business Credit*, February 2015
- **"A New Twist on the Contract Assumption Defense to Preference Claims,"** Bruce S. Nathan, David M. Banker, *Business Credit*, January 2015
- **"Does the Equal Credit Opportunity Act Apply to Spousal Guarantors? Yes and No!,"** Bruce S. Nathan, Eric Chafetz, *Business Credit*, November/December 2014
- **"Paid New Value Preference Defense Prevails Again In Delaware!,"** Bruce S. Nathan, *CRF News*, October 2014
- **"Limits on Foreign Goods Sellers' §503(b)(9) Priority Rights,"** Bruce S. Nathan, Scott Cargill, *American Bankruptcy Institute Journal*, October 2014
- **"Section 503(b)(9) Priority Status Limited for Shipments from Abroad,"** Bruce S. Nathan, Eric Chafetz, *Business Credit*, September/October 2014
- **"Materialman's Lien Rights: Post-Petition Perfection Approved,"** Bruce S. Nathan, *Business Credit*, July/August 2014
- **"Expanding the Scope of the Contemporaneous Exchange for New Value Preference Defense to Multiple Party Transactions,"** Bruce S. Nathan, David M. Banker, *Business Credit*, June 2014
- **"Insuring Your Largest Asset, Your Accounts Receivable - Demystifying Credit Insurance and Negotiating the Best Possible Policy,"** Bruce S. Nathan, Christopher C. Loeber, Eric Jesse, *Business Credit*, June 2014
- **"Mistakes in a UCC Financing Statement's Collateral Description Can Be Hazardous to a Perfected Security Interest!,"** Bruce S. Nathan, Eric Chafetz, *Business Credit*, May 2014
- **"Another Bankruptcy Blow for Triangular Setoff,"** Bruce S. Nathan, Eric Chafetz, *Business Credit*, April 2014
- **"Counting a Creditor's New Value Paid Post-Petition: You Can Have Your Cake and Eat It Too,"** Bruce S. Nathan, Eric Chafetz, *Business Credit*, March 2014
- **"Construction Trust Fund Payments as a Defense to Preference Claims: A Matter of Tracing,"** Bruce S. Nathan, *Business Credit*, February 2014
- **"Sparks Continue to Fly – Electricity is not Eligible for Section 503(b)(9) Status and Other Shocking Developments,"** Bruce S. Nathan, Michael S. Etkin, David M. Banker, *Business Credit*, January 2014
- **"Electricity as a Good or a Service: Some "Shocking" Developments,"** Bruce S. Nathan, Eric Chafetz, *Business Credit*, November/December 2013
- **"The Subjective Prong of the Ordinary Course of Business Preference Defense: Yet Another Approach,"** Bruce S. Nathan, Eric Chafetz, *Business Credit*, September/October 2013

- **"Failing to Adequately Assert Setoff Rights Could Jeopardize Recovery,"** Bruce S. Nathan, Scott Cargill, *American Bankruptcy Institute Journal*, October 2013
- **"Extending the Statute of Limitations for Preference Actions? The Seventh Circuit Rules!,"** Bruce S. Nathan, *Business Credit*, July/August 2013
- **"Critical Vendor Treatment? No Sure Thing!,"** Bruce S. Nathan, *Business Credit*, June 2013
- **"Preference Double Feature: You Win Some, You Lose Some!,"** Bruce S. Nathan, David M. Banker, *Business Credit*, May 2013
- **"Everything You Need to Know About the "Ordinary Course of Business" Preference Defense, and More!,"** Bruce S. Nathan, David M. Banker, *The Credit and Financial Management Review*, First Quarter 2013
- **"Electricity is a Good Subject to Section 503(b)(9) Priority Status: A Shocking Development?,"** Bruce S. Nathan, *Business Credit*, April 2013
- **"The Fifth Circuit's Vitro Decision on Cross Border Insolvencies: A Game Changer?,"** Bruce S. Nathan, *Business Credit*, March 2013
- **"Drop Shipment Claims Denied Section 503(b)(9) Priority Status,"** Bruce S. Nathan, *Business Credit*, February 4, 2013
- **"Standby Letter of Credit Payments Can Be Hazardous to Your New Value Preference Defense,"** Bruce S. Nathan, *Business Credit*, January 2013
- **"Electricity Requirements Contract Enjoys Safe Harbor Preference Defense,"** Bruce S. Nathan, Eric Chafetz, *Business Credit*, November/December 2012
- **"KB Toys: Risk Allocation in Bankruptcy Claims Trading,"** Bruce S. Nathan, Scott Cargill, *American Bankruptcy Institute Journal*, October 2012
- **"The Unenforceability of a Foreign Court Order Releasing Non-Debtor Guarantee Claims: The Limits of the Comity Doctrine,"** Bruce S. Nathan, *Business Credit*, September/October 2012
- **"A Preference Ordinary Course of Business Defense Trifecta,"** Bruce S. Nathan, *Business Credit*, July/August 2012
- **"Altering Unsecured Creditors' Committee Membership: No Easy Chore!,"** Bruce S. Nathan, *Business Credit*, June 2012
- **"Using the "Safe Harbor" Defense to Defeat Preference Claims,"** Bruce S. Nathan, Scott Cargill, *Business Credit*, May 2012
- **"Preference Relief for Real Estate Material and Service Providers,"** Bruce S. Nathan, *Business Credit*, May 2012
- **"Using Public Information to Identify and React to the Early Warning Signs of a Financially Distressed Customer,"** Bruce S. Nathan, Scott Cargill, *Business Credit*, April 2012
- **"Got Setoff Rights? Think Again,"** Bruce S. Nathan, Scott Cargill, *Business Credit*, March 2012
- **"Another Preference Victory for the Trade: New Value Paid Post-Petition Does Count!,"** Bruce S. Nathan, *Business Credit*, February 2012
- **"Paid New Value Reduces Preference Liability Yet Again!,"** Bruce S. Nathan, *Business Credit*, January 2012
- **"Who Pays the Freight? Interplay Between Priority Claims and a Debtor's Secured Lender,"** Bruce D. Buechler, Bruce S. Nathan, *American Bankruptcy Institute Journal*, November 2011
- **"Is There a Small Preference Venue Limit? Yes and No!,"** Bruce S. Nathan, *Business Credit*, November/December 2011

- **"Trade Creditor Remedies Manual: Trade Creditors' Rights Under The UCC and the U.S. Bankruptcy Code,"** Bruce S. Nathan, Scott Cargill, *American Bankruptcy Institute*, 2011
- **"Standby Letters of Credit and the Independent Principle,"** Bruce S. Nathan, *Business Credit*, September/October 2011
- **"Another Ordinary Course of Business Preference Defense Double Feature,"** Bruce S. Nathan, *Business Credit*, July/August 2011
- **"Everything You Need to Know About New Value as a Preference Defense, and More,"** Bruce S. Nathan, Scott Cargill, David M. Banker, *The Credit and Financial Management Review*, Second Quarter 2011
- **"Joint Check Agreements: Who's on First?,"** Bruce S. Nathan, *Business Credit*, June 2011
- **"Paid for New Value as a Preference Defense, More Good News for the Trade,"** Bruce S. Nathan, *Business Credit*, May 2011
- **"Reclamation Catch-22: Darned If You Do, Darned If You Don't,"** Bruce S. Nathan, David M. Banker, *Business Credit*, May 2011
- **"Yet Another Favorable Court Decision Upholding the Ordinary Course of Business Preference Defense,"** Bruce S. Nathan, *Business Credit*, April 2011
- **"Counting Section 503(b)(9) Priority Claims as Part of a Creditor's New Value Defense to a Preference Claim: Can You Have Your Cake and Eat It Too?,"** Bruce S. Nathan, *Business Credit*, March 2011
- **"Electricity as Goods Entitled to Section 503(B)(9) Priority Status: A Boom for Utilities,"** Bruce S. Nathan, *Business Credit*, February 2011
- **"Critical Vendor Update,"** Bruce S. Nathan, *Business Credit*, January 2011
- **"The Contract Assumption Defense to Preference Claims: Alive and Thriving,"** Bruce S. Nathan, *Business Credit*, November/December 2010
- **"Proving the Subjective Component of the Ordinary-Course-of-Business Defense,"** Bruce S. Nathan, Scott Cargill, *American Bankruptcy Institute Journal*, November 2010
- **"A Preference Ordinary Course of Business Defense Double Feature,"** Bruce S. Nathan, *Business Credit*, September/October 2010
- **"Do Fully Funded Section 503(b)(9) Priority Claims Count as Additional New Value to Reduce Preference Liability? A Contrary View!,"** Bruce S. Nathan, *Business Credit*, July/August 2010
- **"Section 503(b)(9) Priority Claim Developments: The Beat Goes On!,"** Bruce S. Nathan, *Business Credit*, June 1, 2010
- **"Vendors Beware: The Risk of a Debtor's Unauthorized Post-petition Payments For Post-petition Goods or Services,"** Bruce S. Nathan, *Business Credit*, May 2010
- **"Creditors' Committee Disclosure Obligations Updated: The Use of Internet Websites,"** Bruce S. Nathan, *Business Credit*, April 2010
- **"The Interplay Between Section 503(b)(9) Priority Claims and Preference Claims,"** Bruce S. Nathan, *Business Credit*, March 2010
- **"Section 503(b)(9) Goods Supplier Priority - Beware of the Debtor's Setoff Rights,"** Bruce S. Nathan, *Business Credit*, February 2010
- **"Hooray for Delaware - A Tale of Two Decisions,"** Bruce S. Nathan, *Business Credit*, January 2010
- **"Recent Case Law Developments Concerning Section 503(b)(9) 20-Day Goods Priority Claims,"** Bruce S. Nathan, *Business Credit*, November/December 2009
- **"The 20-Day Goods Priority Claim Under Bankruptcy Code Section 503(b) (9),"** Bruce S. Nathan, Scott Cargill, *The Credit and Financial Management Review*, Fourth Quarter 2009

- **"Compelling Postpetition Trade Credit: Navigating Uncharted Waters,"** Bruce S. Nathan, Scott Cargill, *American Bankruptcy Institute Journal*, October 2009
- **"Compelling Bankruptcy Trade Credit: The Great Unknown,"** Bruce S. Nathan, *Business Credit*, September/October 2009
- **"The Limits of Consignment Rights When Consigned Goods Are Manufactured Into Finished Product,"** Bruce S. Nathan, *Business Credit*, July/August 2009
- **"Enforceability of Triangular Setoff Rights In Safe Harbor Contracts - Still An Open Question? Part 2,"** Bruce S. Nathan, S. Jason Teele, Matthew A. Magidson, *Derivatives Week*, June 29, 2009
- **"Enforceability of Triangular Setoff Rights In Safe Harbor Contracts - Still An Open Question? Part 1,"** Bruce S. Nathan, S. Jason Teele, Matthew A. Magidson, *Derivatives Week*, June 22, 2009
- **"Demystifying Chapter 15 of the Bankruptcy Code,"** Bruce S. Nathan, *Business Credit*, June 2009
- **"Credit Card Payments as Preferences: The Sixth Circuit Joins the Bandwagon,"** Bruce S. Nathan, *Business Credit*, June 2009
- **"Preference Dynamic Duo II: Whatever Happened to the Small Preference Venue Limitation?,"** Bruce S. Nathan, *Business Credit*, May 2009
- **"Triangular Setoff: A Viable Remedy or a Thing of the Past?,"** Bruce S. Nathan, *Business Credit*, April 2009
- **"Is Debtor's Credit Card Payment a Preference,"** Bruce S. Nathan, *Business Credit*, March 2009
- **"Effective Seller Remedies When Confronting a Financially Distressed Buyer Prior to Bankruptcy,"** Bruce S. Nathan, *Business Credit*, February 2009
- **"Recent Court Decisions on Consignments and Other Security Arrangements: The Benefits of Aggressive Creditor Action and the Pitfalls of Failing to Document Properly,"** Bruce S. Nathan, *Business Credit*, January 2009
- **"Builders Trust Fund Payments: A Defense to Preference Exposure,"** Bruce S. Nathan, *Business Credit*, November/December 2008
- **"Impact of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act on Retail Bankruptcies,"** Bruce S. Nathan, *Journal of Trading Partner Practices*, November 11, 2008
- **"Courts Remain Split over Whether a Debtor's Credit Card Payment is an Avoidable Preference,"** Bruce S. Nathan, Scott Cargill, *ABI Journal*, October 2008
- **"Release of State Mechanic's and Other Lien Law Rights As a Defense to Preference Claims? Yes and No!,"** Bruce S. Nathan, *Business Credit*, October 2008
- **"Overseas Bear Stearns Hedge Funds Denied Chapter 15 Relief,"** Bruce S. Nathan, *Business Credit*, July/August 2008
- **"Mechanic's Liens and the Bankruptcy Code,"** Bruce S. Nathan, *Business Credit*, June 2008
- **"Is a Debtor's Credit Card Payment a Preference?,"** Bruce S. Nathan, *Business Credit*, May 2008
- **"PACA Trust Destroyed by Written Agreement Extending Payment Terms,"** Bruce S. Nathan, *Business Credit*, April 2008
- **"State Law Artisans' Lien Rights Defeat Preference Exposure - The Saga Continues,"** Bruce S. Nathan, *Business Credit*, March 2008
- **"The Critical Vendor Roller Coaster,"** Bruce S. Nathan, *Business Credit*, February 2008
- **"Section 503(b)(9) Goods Supplier Priority — More Recent Developments,"** Bruce S. Nathan, *Business Credit*, January 2008

- **"Beware of Claims Bar Dates for Section 503(b)(9) Administrative Priority Claims in Favor of Goods Suppliers,"** Bruce S. Nathan, *Business Credit*, November/December 2007
- **"Are State Preference Laws Preempted by the United States Bankruptcy Code? Not Necessarily!,"** Bruce S. Nathan, Scott Cargill, *The Credit and Financial Management Review, Volume 13, Number 4*, Fourth Quarter 2007
- **"The Risks of a Single Creditor Involuntary Bankruptcy Petition; Tread Extra Carefully!,"** Bruce S. Nathan, *Business Credit*, October 2007
- **"A Preference Dynamic Duo: State Law Lien Rights Defeat Preference Claim While Payment by Credit Card Does Not!,"** Bruce S. Nathan, *Business Credit*, September 2007
- **"Credit Transactions May Be Eligible for the Section 547 (c)(1) Contemporaneous Exchange for New Value Defense to Preference Exposure: The Third Circuit Court of Appeals Speaks,"** Bruce S. Nathan, *Business Credit*, July/August 2007
- **"Preference Checklist,"** Bruce S. Nathan, *Business Credit*, June 2007
- **"Recent Favorable Preference Rulings for Construction Material and Service Suppliers,"** Bruce S. Nathan, *Business Credit*, June 2007
- **"Paid for New Value Really Does Count: An Update on the New Value Defense and Other Preference Issues,"** Bruce S. Nathan, *Business Credit*, May 2007
- **"Recent Case Law Development Under the 2005 Amendments to the Bankruptcy Code—Part II,"** Bruce S. Nathan, Scott Cargill, *Business Credit Journal of NACM Oregon*, May 2007
- **"Reclamation Rights Under BAPCPA: The Same Old Story,"** Bruce S. Nathan, *Business Credit*, April 2007
- **"Recent Case Law Development Under the 2005 Amendments to the Bankruptcy Code—Part 1,"** Bruce S. Nathan, Scott Cargill, *Business Credit Journal of NACM Oregon*, April 2007
- **"The New 20-Day Administrative Claim in Favor of Goods Suppliers: Yes to Priority; No to Immediate Payment,"** Bruce S. Nathan, *Business Credit*, March 2007
- **"The ABCs of Legal Issues Encountered by Credit Professionals,"** Bruce S. Nathan, *Business Credit*, February 2007
- **"Joint Check Arrangement Does Not Protect Against Preference Exposure,"** Bruce S. Nathan, *Business Credit*, January 2007
- **"Bailment Or Consignment: It Makes A Difference!,"** Bruce S. Nathan, *Business Credit*, November/December 2006
- **"The BAPCPA Ordinary Course Of Business Defense To Preference Claims: At Last, A Court Speaks,"** Bruce S. Nathan, *Business Credit*, October 2006
- **"A Trade Creditor's Post-Petition Obligations Under An Unexpired Executory Contract Prior To Assumption Or Rejection: The Muddled State Of The Law,"** Bruce S. Nathan, *Business Credit*, September 2006
- **"Being Fully Secured Defeats Preference Exposure,"** Bruce S. Nathan, *Business Credit*, July/August 2006
- **"Manual of Credit And Commercial Laws,"** Bruce S. Nathan, *National Association of Credit Management (97th Edition)*, 2006
- **"Reclamation Manual/Sellers' Rights of Reclamation, Stoppage of Delivery and New Administrative Claim,"** Bruce S. Nathan, *American Bankruptcy Institute*, 2006
- **"Involuntary Bankruptcy Petition Upheld: Media Providers' Claims Against Advertising Agency NOT Subject To Bona Fide Dispute,"** Bruce S. Nathan, *Business Credit*, June 2006
- **"Sales of Trade Claims: The Rewards and The Risks,"** Bruce S. Nathan, *Business Credit*, May 2006

- **"The New Creditors' Committee Disclosure And Solicitation Obligations: The Refco Blueprint!,"** Bruce S. Nathan, *Business Credit*, April 2006
- **"Getting The Biggest Bang For Your New Value Preference Defense Buck,"** Bruce S. Nathan, *Business Credit*, March 2006
- **"Purchase Money Security Interest Suppliers Beware: Tracing Collateral Proceeds Is No Sure Thing,"** Bruce S. Nathan, *Business Credit*, February 2006
- **"The Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Real Property Lessors and Owners and Other Bankruptcy Law Developments,"** Bruce D. Buechler, Bruce S. Nathan, *New York State Bar Association Leasing Committee Program*, January 18, 2006
- **"A Trade Creditor's Setoff Rights In Bankruptcy: No Slam Dunk,"** Bruce S. Nathan, *Business Credit*, January 2006
- **"Critical Vendor' Status Is No Escape From PREFERENCE Risk,"** Bruce S. Nathan, *Business Credit*, November/December 2005
- **"Real Estate Material and Services Suppliers, Rejoice!,"** Bruce S. Nathan, *Business Credit*, October 2005
- **"Section 506(c) Waiver Enforceable; Good News for DIPs and Other Secured Lenders,"** Bruce S. Nathan, *American Bankruptcy Institute Journal*, October 2005
- **"A Preference Defense Quartet: Four Recent Court Decisions To Mull Over,"** Bruce S. Nathan, *Business Credit*, September 2005
- **"A Standby Letter of Credit Payment Within the Preference Period is Not a Preference,"** Bruce S. Nathan, *Business Credit*, June 2005
- **"Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: A Summary of the Provisions Affecting Derivative Agreements,"** Bruce S. Nathan, Scott Cargill, *Lowenstein Sandler Bankruptcy Alert*, May 6, 2005
- **"Sherwood Partners Threatens Viability of State Law Preference,"** Bruce S. Nathan, *American Bankruptcy Institute Journal*, May 2005
- **"Critical Vendor Orders After Kmart: A New Lease on Life,"** Bruce S. Nathan, *Business Credit*, May 2005
- **"Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Significant Business Bankruptcy Changes in Store for Trade Creditors,"** Bruce S. Nathan, Wanda Borges, Esq., *Business Credit*, May 2005
- **"Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Landmark Business and Other Bankruptcy Changes,"** Bruce S. Nathan, Scott Cargill, *Lowenstein Sandler Bankruptcy Alert*, May 5, 2005
- **"Reclamation Rights vs. Floating Inventory Lien: A Victory At Last!,"** Bruce S. Nathan, *Business Credit*, April 2005
- **"State Law Preference Actions: A Thing Of The Past?,"** Bruce S. Nathan, Scott Cargill, *Business Credit*, March 2005
- **"Be Careful When Taking Regular Checks For Lien Release Or Cash Transactions: A Commentary On The Jwj Contracting Co., Case,"** Bruce S. Nathan, *Business Credit*, March 2005
- **"The Dirty Little Secret Of Critical Vendor Orders: The Hidden Preference Risk That Lurks!,"** Bruce S. Nathan, *Business Credit*, February 2005
- **"Battered And Coated French Fries As A Fresh Vegetable Eligible For PACA Protection: Are You Kidding?,"** Bruce S. Nathan, *Business Credit*, November/December 2004
- **"Reclamation Rights Trumped by UCC's Floating Inventory Security Interest,"** Bruce S. Nathan, *American Bankruptcy Institute Journal*, November 2004

- **"A New Defense Against Preference Claims?,"** Bruce S. Nathan, Scott Cargill, *Credit Today*, October 2004
- **"Standby Letters of Credit and the Strict Compliance Standard: The Case of the Overstated Sight Draft,"** Bruce S. Nathan, *Business Credit*, October 2004
- **"Are Reclamation Claims Heading for Oblivion Where the Debtor Has a Secured Inventory Lender?,"** Bruce S. Nathan, *Business Credit*, September 2004
- **"Critical Vendor Payments Denied by Kmart Ruling - Part 2,"** Bruce S. Nathan, Scott Cargill, *National Credit News*, July-August 2004
- **"Critical Vendor Payments Denied by Kmart Ruling - Part 1,"** Bruce S. Nathan, Scott Cargill, *National Credit News*, June 2004
- **"PACA Rights Destroyed by Oral Agreement Extending Payment Terms,"** Bruce S. Nathan, *Business Credit*, June 2004
- **"Section 502(d) Preclusion of Preference Claims: A New Defense or a Dry Hole?,"** Bruce S. Nathan, *American Bankruptcy Institute Journal*, May 2004
- **"Can Sanctions Be Imposed For Improperly Prosecuted Preference Actions?,"** Bruce S. Nathan, *Business Credit*, May 2004
- **"Consignment the Right Way: File a UCC Financing Statement,"** Bruce S. Nathan, *Business Credit*, April 2004
- **"Critical Vendor Payments Denied by Kmart Ruling,"** Bruce S. Nathan, Scott Cargill, *Lowenstein Sandler*, April 2004
- **"Extra, From the Appellate Corner - Hot Off the Presses: Delaware Appellate Court Affirms Priority of Trade Creditor's Stoppage of Delivery Rights Over Buyer's Inventory Secured Lender,"** Bruce S. Nathan, *Business Credit*, March 2004
- **"Are Reclamation Rights Preserved Where Debtor's Secured Dip Lender Pays Off Pre-Petition Secured Inventory Lender? Yes and No!,"** Bruce S. Nathan, *Business Credit*, March 2004
- **"Preferences, Reclamation and PACA in One Case: A Three-Ring Circus,"** Bruce S. Nathan, *Business Credit*, February 2004
- **"PACA Trust Survives E-Mail Exchange Extending Payment Terms,"** Bruce S. Nathan, *Business Credit*, January 2004
- **"The Ordinary-course-of-business Defense to Preference Claims: First-time Transactions Count Too!,"** Bruce S. Nathan, *American Bankruptcy Institute Journal*, November 2003
- **"A New Limit on Reclamation Claims: The Latest on the Goods on Hand Requirement,"** Bruce S. Nathan, *Business Credit*, November/December 2003
- **"A New Limit on the New Value Preference Defense,"** Bruce S. Nathan, *Business Credit*, October 2003
- **"Trade Creditors Beware: Providing Post-Petition Goods and Services to a Chapter 11 Debtor Under a Pre-Petition Contract Without Protection Can Be Toxic to Collectibility,"** Bruce S. Nathan, *Business Credit*, September 2003
- **"Letter of Credit Beneficiary Beats Issuing Bank Based on Conforming Documents and Untimely and Improper Dishonor,"** Bruce S. Nathan, *Business Credit*, July/August 2003

### Bar Admissions

- 1981, New York

# Stay Connected

## FIND US ON



[www.lowenstein.com](http://www.lowenstein.com)

New York

Palo Alto

Roseland

Washington, D.C.

Utah

**Lowenstein  
Sandler**