MIND YOUR T’s AND C’s

PRESENTATION FOR NACM 2016 TELECONFERENCES

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ENFORCEABILITY OF T’S AND C’S CONTRACT FORMATION
Contract Formation

- **Offer**
  - One party communicates its interest to enter into a contract on certain terms with a second party
- **Acceptance**
  - Second Party accepts offer
- **Contract is Created When Offer is Made and Accepted**
- **Consideration also Required**
  - Something of value given by one party to other party in exchange for act or promise

Uniform Commercial Code Article 2 – Sales

- **Applies to Domestic Sales of Goods**
- **Contains Uniform Provisions for:**
  - Formation of contracts
  - Terms
  - Warranties – protection for buyer
  - Remedies
  - State not Federal law
  - May vary by state
**Uniform Commercial Code Article 2 – Sales Contract Formation**

- **Offer**
  - Purchase order
  - E-mail
  - Fax
  - Telephone call
  - Supply agreement

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**Uniform Commercial Code Article 2 – Sales Contract Formation**

- **Acceptance**
  - Performance – e.g., shipment
  - Promise to perform (e.g., ship) by certain date
  - Confirmation/terms and conditions
  - Signed credit application/terms and conditions
  - Signed supply agreement
  - Other action evidencing acceptance
  - By electronic medium

- **An Invoice is Not a Contract**
Writing and Signature Requirements For Contracts

- Enforceability of Contracts is Usually Subject to Some Form of Statute of Frauds Requiring Signed Writing
- UCC Article 2 Statute of Frauds re Sale of Goods, UCC §2-201
  - (1) Except as otherwise provided in this section, a contract for the sale of goods for a price of $500 or more is not enforceable...unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.
  - (2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

Using A Credit Application As Contract

- Should be “Signed” by Buyer to Have a Binding Contract
  - Make sure party signing credit application is duly authorized to bind buyer
- Should be Dated
- Should Include All Key Terms Sought by Seller
- Signed Credit Application Containing Terms is Governing Agreement
- Avoids Battle of Forms
UCC Article 2 – Sale Of Goods Contract Formation: Dangerous Scenario For Seller

• Buyer’s Purchase Order (Offer) – Onerous Terms from Seller’s Perspective
  – Unfavorable pricing and credit terms
  – Extensive warranties
  – Seller responsible for all of Buyer’s attorneys’ fees
  – Any dispute resolved by courts in Buyer’s jurisdiction
  – Terms in Purchase Order will control over any contrary or additional terms contained in confirmation and other documents from Seller

• If Seller Performs, It Is Bound By All Unfavorable Terms in Buyer’s Purchase Order

Common Law Service Contracts – Inconsistent Terms

• Mirror Image Rule
  – Terms in acceptance must mirror terms in offer
  – Acceptance at variance with offer
    • Is a rejection
    • It is a counteroffer
    • No contract is formed unless accepted by other party
      o Acceptance evidenced by performance
  – Last document controls contract terms
UCC Article 2 – Sale Of Goods – Additional or Different Terms: Battle of Forms

• Contract Created Upon Acceptance Even Though Acceptance Has Additional or Different Terms (Compared With Offer)
  – E.g., Agreement first reached either orally or by exchange of correspondence or emails, followed by one or both parties sending a confirmation, acknowledgment or memo containing additional or different terms not previously discussed
  – A letter or fax confirming an agreement adds terms or contains different terms

Battle of Forms: UCC §2-207 Additional Terms in Acceptance or Confirmation

• (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
Battle of Forms: UCC §2-207 Additional Terms in Acceptance or Confirmation

• (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless
  – (a) the offer expressly limits acceptance to the terms of the offer;
  – (b) they materially alter it; or
  – (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

Battle of the Forms: Examples of Provisions Limiting New Terms

• Buyer’s Side
  – “Any acceptance of this order that contains terms inconsistent with or in addition to the terms of this order is not binding unless agreed to by buyer in writing.”

• Seller’s Side
  – “Acceptance is limited to terms of this Confirmation. Seller objects to any different or additional terms contained in any purchase order, offer or other documents sent or to be sent by Buyer, which are expressly rejected.”
  – “Buyer shall not change any of the terms and conditions contained in this Agreement, unless seller agrees in writing.”
Battle of Forms – UCC Article 2

• When Is An Additional Term A Material Alteration?

• UCC §2-207, Comment 4 Articulates a Standard Of Surprise or Hardship in Determining Whether an Acceptance “Materially Alters the Offer”

• Examples of Terms that Would Be Unenforceable “Material Alterations”
  – Warranty disclaimer
  – Requirement of guaranty of 90% or 100% deliveries, where usage of trade allows greater quantity leeway
  – Seller’s right to cancel contract upon buyer’s failure to pay any invoice when due
  – Requirement for assertion of complaints in a shorter time than “customary or reasonable”

Battle of Forms – UCC Article 2

• UCC §2-207, Comment 5 Lists Additional Terms That “Involve No Element of Unreasonable Surprise” and Do Not Materially Alter An Offer. Examples:
  – Interest on past due invoices
  – Credit terms consistent with trade practice which “do not limit any bargained for credit.”
  – Limitation of right of rejection for defects that fall within customary trade tolerances or otherwise limiting remedy in a reasonable manner
  – Clause fixing reasonable time for asserting complaints within customary limits
  – Force Majeure type clause
Battle of Forms – UCC Article 2

- UCC §2-207(2) Is Silent on Whether Other Terms Constitute Material Alteration. Examples:
  - Arbitration
  - Risk of Loss
  - Payment of attorneys’ fees
  - Inability to modify contract terms
- The Courts Are Divided Over Whether These Terms Constitute An Unenforceable Material Alteration

UCC Article 2 – Battle of the Forms – Different Terms

- UCC §2-702(2) Is Silent On Whether Different Terms Contained In An Acceptance Become Part of a Sale Contract
- Some Courts/Commentators Apply UCC §2-702(2) to Include “Different Terms” as Part of “Additional Terms”
- Other Courts/Commentators Limit UCC §2-702(2) To Only “Additional Terms” and Not “Different Terms”
UCC Article 2 – Battle of the Forms – Different Terms in Offer and Acceptance

- Division Among Courts/Commentators that Limit UCC §2-702(2) to only Additional Terms and Not “Different Terms”
  - “Knockout Rule:” Some courts/commentators hold different terms in offer and acceptance “Knockout” each other and the contract is based on terms parties agreed upon with UCC Article 2 supplementing or filling gaps
  - “Fall Out Rule:” Other courts/commentators use “fall out” rule where different terms appear in acceptance – the different terms “fall out” and do not become part of the contract

Sales Contract By Conduct

- Governed by UCC §2-702(3) Which Adopts “Knockout” Rule
  - Contract consists of terms parties agreed to with UCC supplementing the contract by filling in any gaps

- The Courts Are Divided About the UCC Supplemental Gap-Fillers
  - Some courts allow only terms expressly stated in UCC, such as an implied warranty
  - Other courts also allow course of dealing/ performance and trade practice to supplement and qualify contract terms
Modification Of Sale Contracts

• Agreement of Parties

• One Exception—Prior Agreements May be Changed by
  – Course of performance, course of dealing, or usage of trade and
  – Consistent additional terms
  – Unless the court finds the prior written agreement was intended as a complete and exclusive statement of the terms of the agreement
ENFORCEABILITY OF T’S AND C’S
KNOW YOUR CUSTOMER’S LEGAL STATUS
**Enforceability of Terms and Conditions: Legal Form of Business**

- **Confirm Legal Form of Business**
  - **Corporation**
    - Artificial entity created in accordance with the law of the state in which it is organized
    - As a general rule, officers, directors and shareholders are shielded from personal liability
  - **Limited Liability Company**
    - Artificial entity created in accordance with the law of the state in which it is organized
    - As a general rule, members and managers are shielded from personal liability

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**Enforceability of Terms and Conditions: Legal Form of Business**

- **Confirm Legal Form of Business**
  - **Partnership**
    - **General Partnership**
      - Each partner responsible for partnership's debts
    - **Limited Partnership**
      - Only general partner responsible for partnership's debts
  - **Limited Liability Partnership**
  - **Sole Proprietorship**
    - Owner liable for all debts
Enforceability of Terms and Conditions: Legal Form of Business

• Must Verify Legal Status
  – Determine state of incorporation/organization
  – Confirm no change in legal form of business
  – Check appropriate state or local office

• Recommend Provision Requiring Applicant to Inform Seller of Change in Legal Status

• Need for New Agreement with Terms and Conditions if Customer Changes Legal Status
ENFORCEABILITY OF T’S AND C’S
KNOW YOUR CUSTOMER’S CORRECT LEGAL NAME
Assuring You have Customer’s Correct Legal Name

• Really Important – Getting Customer’s Legal Name Right is Critical to an Enforceable Contract and to Utility of Certain Risk Mitigation Tools
  • D/B/A Not Necessarily Correct Legal Name
  • Division Name Not Correct Legal Name
  • How to Verify You Have Correct Legal Name?

Correct Legal Name

• Importance of Customer’s Correct Legal Name
  – Enforceable Terms and Conditions
  – Collecting Claim/Enforcing Judgment vs. customer
  – Obtaining perfected security/consignment interest
    • Need debtor’s correct legal name for good UCC-1
  – UCC, tax and other lien searches
  – Obtaining payment on guaranty
  – Obtaining payment on letter of credit
    • Name of beneficiary/applicant
  – Obtaining payment on credit insurance/put
Information Sources Indicating Customer’s Name Change

• Customer’s Name on Check
• Customer’s Name on Purchase Orders
• Customer’s Name on Shipping Documents
• Customer’s Name on State Sales/Use Tax Exemption Certificate
• Customer’s Name on Letterhead
• Customer’s Emails – Name on Signature Block

Keeping On Top of Customer Name Change

• If You Have Reason to Believe the Customer’s Name or Address Changed, Check With the Customer and Check the Customer’s Name Electronically on the Secretary of State’s Website In the State Where the Customer Was Formed

• Each Fiscal Quarter
  – Check with your customer to update name
  – Obtain a certified good standing certificate from the Secretary of State’s website in the state where the customer was formed

• Fraud Risk-Customer Changes Its State of Formation Without Notice
Affiliated Entities

• Confirm if Customer is Part of Group of Affiliated Companies
  – Parent
  – Subsidiary
  – Affiliates

• Confirm Which Entity You Will Look to For Payment
  – Risk of payment from affiliate with whom you are not doing business
  – Consider if guaranty is necessary
  – Consider setoff issues
ENFORCEABILITY OF T’S AND C’S ON YOUR WEBSITE
Enforceability of Terms and Conditions on Website

• Existing Case Law Trending Toward Enforcement of Terms and Conditions That Are Sufficiently Incorporated By Reference Into a Written or Electronic Contract But Accessible Exclusively Via Internet (Website)

Enforceability of Terms and Conditions on Website

• Suggestions:
  – Written agreement should state in conspicuous location in bold type or capital letters that agreement is governed by and parties agree to be bound by terms and conditions posted on designated website and terms and conditions are incorporated by reference in agreement
  – Terms should be readily accessible on website and full website address, from which terms can be viewed and downloaded, should be included
Enforceability of Terms and Conditions on Website

• Sample Language:
  – “By my signature below, I certify that I have read and agree to the provisions set forth in this agreement and to the terms and conditions posted at http://www.brucesnathan.com/genterms.html and am duly authorized to bind [name of customer] to such provisions.”
SAMPLE
T’S AND C’S
Terms and Conditions

• Credit Terms; Buyer’s Agreement To Be Bound By Terms Set Forth Elsewhere; or Payment Due According To Invoice Terms
• Shipping/Delivery Terms
• Title/Risk of Loss
• Obligation to Inform Seller of Change in Applicant’s Legal Name and/or Legal Status
• Must Provide Financials at Periodic Intervals

Terms and Conditions

• Buyer’s Agreement Not to Change Terms Unless Seller Agrees in Writing
• Seller Can End Credit Terms and Switch to Cash Terms
  – At Seller’s discretion
  – Upon Buyer’s default
• Warranty Limitations
• Liability/Damage Limitations
• Limited Period for Buyer to Assert Claims
Terms and Conditions

• Setoff Rights
• Interest Charge on Delinquent Invoices
• Attorneys’ Fees and Other Collection Costs
• Choice of Law
• Consent to Jurisdiction/Venue
  – Home court advantage
• Arbitration Provision
• Waiver of Jury Trial

Terms and Conditions

• No Assignment of Buyer’s Contractual Obligations Without Seller’s Consent
• Merger Clause
• Buyer’s Agreement to Be Bound by Terms and Conditions In Credit Application or in Another Place (e.g., Seller’s Website)
Terms and Conditions

• Setoff Involving Transactions Between Seller and Buyer

• Setoff Language for Credit Application

  “Seller and Applicant agree that notwithstanding anything to the contrary contained herein or in any other contract, agreement or document, Seller may offset any debt now or hereafter owing to Applicant against any debt now or hereafter owing by Applicant to Seller.”

Terms and Conditions

• Triangular Setoff

• Right of Seller Dealing With Multiple Affiliated Companies to Setoff Debt it Owes One Affiliate against Seller’s Claim Against Another Affiliate

• Generally Unenforceable Under State Law, Based on Lack of Mutuality, Unless Agreed To
Terms and Conditions

• Triangular Setoff Language

“XYZ, and its direct and indirect affiliates, divisions and subsidiaries, including, but not limited to, XYZ Holdings Inc., XYZ Inc., XYZ Limited and XYZ 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 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.

Terms and Conditions

• Warning: Decisions in New York (In re Lehman Bros.) and Delaware (In re SemCrude, L.P. and In re American Home Mortgage Holdings, Inc.) Have Rejected the Enforceability of Triangular Setoffs in Bankruptcy Cases
Terms and Conditions

• It is understood that if any invoice owing by Applicant to Seller is not paid by the due date, Applicant agrees to pay interest on the past due amount at the rate of eighteen percent (18%) per annum or the highest rate permitted under applicable law, whichever is lower.

Terms and Conditions

• To the extent that any discrepancy exists between these Terms and those of any sales quotation, Purchase Order, invoice or other similar document, these Terms shall control.

• No modification or waiver of any of these Terms shall be enforceable, unless agreed to in writing by Seller.
Terms and Conditions

- Applicant is under an obligation to inspect the Contracted Goods immediately upon receipt for correctness, completeness and conformity. Incorrect, incomplete or nonconforming Contracted Goods must be reported to Seller in writing within seven (7) days from the date of delivery of the Contracted Goods. Otherwise, Buyer shall be deemed to have accepted the Contracted Goods. Upon written notice from Buyer, Seller will correct incorrect and/or incomplete orders at its own expense. For nonconforming Contracted Goods, Seller, at its sole discretion, will: (i) repair the product or part thereof; (ii) furnish a replacement product or affected part thereof; (iii) issue a refund in an amount equal to the original selling price for the item; or (iv) deny the claim according to those terms.

Terms and Conditions

- Seller will not accept the return of any Contracted Goods that are conforming and non-defective unless such return has previously been agreed to in writing and signed by Seller’s Customer Service Operations Manager. All permitted returns of the Contracted Goods shall be made in its original packaging and not broken or altered. A twenty percent (20%) restocking fee applies to all returns of conforming and non-defective goods and for abandoned Contracted Goods. Return shipping is at the expense of Applicant. The determination of whether any particular Contracted Goods are conforming and/or non-defective shall be made exclusively by Seller.
Terms and Conditions

• Except as provided in Seller’s product warranty, warranty of title or infringement, Seller does not make or give any representations, guarantees, warranties or conditions of any kind, express or implied, including warranties as to performance, merchantability, or fitness for a particular purpose, and warranties arising by statute or otherwise, or from a course of dealing or usage of trade.

Terms and Conditions

• The aggregate cumulative liability of Seller and its affiliates under common control with it, directors, officers, employees, representatives and agents for all claims arising hereunder, notwithstanding the form in which any such action is brought, whether in contract, tort (including negligence), or otherwise, shall be limited in the aggregate to the total amounts paid by Applicant to Seller under the applicable purchase order or order confirmation.
Terms and Conditions

• Seller shall not be liable for any consequential, incidental, indirect, special, exemplary or punitive damages, third party claims, loss of revenues, loss of profits or loss of savings even if advised of the possibility of such damages and regardless of the form in which any action is brought, whether in contract, tort (including negligence), or otherwise.

Terms and Conditions

• Any action for Seller’s breach of its warranties or any other breach of contract must be commenced by Applicant within one (1) year after the cause of action arose.
The credit terms provided by Seller are in its sole discretion and can be terminated at any time by Seller. If at any time Seller reasonably determines that Applicant’s financial condition does not justify the continuation of Seller’s performance, Seller, at its sole discretion, may require full or partial payment in advance for the Contracted Goods from Applicant; declare the total amount owed by Applicant immediately due and payable; or, without any notice, suspend or terminate any performance without protest or penalty from Applicant, including cancelling all unfulfilled orders.

These Terms shall be governed and construed in accordance with the laws of the State of New York, and any action, claim, litigation or dispute resolution process brought to enforce these Terms shall be commenced and adjudicated in the state or federal courts in the Southern District of New York.
Terms and Conditions

- Neither Party may assign its rights or delegate its duties or obligations under these Terms without the prior written consent of the other Party. Any attempt to make such an assignment or delegation without written consent will be void.
GUARANTY TERMS
Guaranty – Recommended Provisions

- Guarantor’s Undertaking
  - Guaranty of payment – yes
    - Creditor can look to guarantor for immediate payment upon default by customer without exhausting collection efforts against customer
  - Guaranty of collection – no!
    - Creditor must exhaust collection efforts against customer prior to proceeding against guarantor

- Limits
  - Dollar amount
  - Duration
  - Very dangerous!
  - Collateral?

Guaranty – Recommended Provisions

- As an inducement to you in your sole discretion to sell goods and/or provide services from time to time to the Customer on such terms of credit as you shall, in your sole discretion, grant and in consideration of such sales or credit as may be so extended by you, the undersigned (“Guarantor”) agrees to be primarily liable for and to pay you forthwith when due, or upon demand thereafter, with interest, and without deduction for any claim of setoff or counterclaim of the Customer or the Guarantor, or loss of contribution from any co-guarantor hereunder, the full amount of any and all obligations and indebtedness of the Customer now or hereafter owing to you, however arising, together with all interest, costs and expenses and attorneys’ fees incurred by you because of the Customer’s default or because of any default hereunder (“Obligations”). This Guaranty is a guarantee of payment and is a primary, direct, immediate and unconditional obligation of the Guarantor and shall be enforceable by you before or after proceeding against the Customer, any other person or any security held by you.
Guaranty – Recommended Provisions

• Waiver of Guarantor Defenses
  – Extending time of payment without compromising primary indebtedness of customer
  – Exchanging or releasing collateral
  – Failing to perfect security interest or preserve collateral
  – Releasing/settling with other guarantor(s)
  – Other guarantor/surety defenses

Guaranty – Recommended Provisions

• Jury Trial Waiver
• Consent to Jurisdiction
• Governing Law
• Payment of Attorneys’ Fees/Costs
• Account Stated
• Creditor’s Books and Records as Prima Facie Proof of Claim
• Termination
  – Mechanics
  – Effective date
Guaranty

• Preference Reinstatement Provision

*It is intended by the Guarantor that all payments to you in reduction of the Obligations shall be valid, indefeasible and unassailable. If after receipt of any payment of, or proceeds of any collateral applied (or intended to be applied) to the payment of, all or any part of the Obligations, you are for any reason compelled to surrender or voluntarily surrender, such payment or proceeds to any person, (a) because such payment or application of proceeds is or may be avoided, invalidated, declared fraudulent, act aside, determined to be void or voidable as a preference, fraudulent conveyance, impermissible setoff or a diversion of trust funds; or (b) for any other reason, including without limitation (i) any judgment, decree or order of any Court or administrative body having jurisdiction over you or any of your property, or (ii) any settlement or compromise of any such claim effected by you with any such claimant (including the Customer), then the Obligations or part thereof intended to be satisfied shall be reinstated and continue and this Guaranty shall continue in full force as if such payment or proceeds had not been received by you, notwithstanding any revocation thereof or the cancellation of any note or other instrument evidencing any Obligation or otherwise; and the Guarantor shall be liable to pay to you and hereby does indemnify you and hold you harmless for, the amount of such payment or proceeds so surrendered and all expenses (including all attorneys’ fees, court costs and expenses attributable thereto) incurred by you in the defense of any claim made against you that any payment or proceeds received by you in respect of all or any part of the Obligations must be surrendered. The provisions of this paragraph shall survive the termination of this Guaranty, and any satisfaction and discharge of the Customer by virtue of any payment, court order or any federal or state law.*
Guaranty

• Guarantor Execution
  – Provide full name, address and social security number of personal guarantor
  – Notarize/witness signature
  – Make sure individual guarantor is signing in personal capacity (no title!!)

• Corporate/LLC/Partnership Guaranty
  – Evidence of authority of Corporate/LLC/Partnership signatory
  – Acknowledgement/notary
ELECTRONIC CONTRACTS AND TRANSACTIONS
Types of Contracts

- Paper
- Hybrid
- Electronic

Paper and Hybrid Contracts

- Paper Contract:
  - Terms Contained in Written Contract
  - Parties Must Sign the Contract
- Hybrid Contracts are Paper Contracts That Refer to and Incorporate Terms and Conditions Posted on Internet
Electronic Signatures and Documents

• Same Rules Applicable To Written Contracts Apply To E-Contracts

• Federal Law
  – Electronic Signatures in Global and National Commerce Act (“E-Sign”)
    • Federal statute – governs transactions affecting interstate or foreign commerce
    • Compliant electronic signatures, contracts and records are just as enforceable as paper contracts
    • Pre-empts state law inconsistent with E-Sign
    • Does not preempt state law based on UETA

Electronic Signatures and Documents

• Governing State Law
  – Uniform Electronic Transactions Act (“UETA”) adopted by 47 states, District of Columbia, Puerto Rico and Virgin Islands
    • E-Sign rules applicable to e-signatures and e-contracts under state law
    • Applies to sales of goods, not services
  – New York, Illinois and Washington have adopted their own statutes governing electronic transactions
  – UETA applies only to parties that agree to conduct their transaction electronically
Electronic Signatures

• E-Sign and UETA Require That A Party
  – Have an intent to sign electronically for an electronic signature to be valid and enforceable
  – Authentication: Obtain credible electronic signatures
  – Maintain security of electronic contracts

Electronic Signature Issues

• Concerns About Admissibility and Enforceability of Electronically Executed Agreement Based Upon
  – Authentication?
    • How to make sure party signing contract is right party?
    • Mistaken identity?
    • Forgery – unauthorized signature
    • Non-receipt
  – Intent to Agree to Terms
    • Did the signing party know about the contents/terms?
  – Security of electronic document
    • Access to document
    • Risk of unauthorized alteration of terms
Electronic Signature Definition Under E-Sign Law – Broad Definition and Examples

• Sound, Symbol or Process
• Attached to or Associated with Electronic Record
• Made With Intent to Sign Electronic Record
• Examples
  – Name Typed at End of Sender’s Message
  – Mouse Click “I Accept
    • Mouse is mightier than the pen?
  – Password, Pin# Identifying Sender to Recipient
  – Sound
    • “I agree over phone.”
    • Pressing “9” or “#” or other number on phone to confirm agreement

Electronic vs. Digital Signatures

• Electronic Signature – Examples
  – Click “I agree”
  – Pasted handwritten signature

• Digital Signature
  – Creates digital record in electronic document
  – Provides proof of signer identity
  – States when document was created, reviewed, signed and archived
  – Identifies all changes to the document and when changes were made
Authenticating Electronic/Digital Signatures

- How to Identify Parties With No Face to Face Contact?
- Electronic Signature that Cannot Be Verified for Authenticity Is Subject to Challenge
- Identifying Sender:
  - Verifying Sender’s Internet Protocol (IP) Address
  - Password Requirement
  - Confirming Audit Trail Which Identifies
    - Sender
    - Creation date
    - View date(s)
    - Signature date
    - Alteration date

E-mails As Contracts

- Courts Have Ruled That an E-mail Qualifies as a Writing That Satisfies the Statute of Frauds
  - Requires proof that parties reached agreement on essential contract terms
- Signatures on E-Mails
  - Typed name of sender
  - Scanned image of handwritten signature
- Authentication
  - Did sender actually send?
  - Was sender an authorized signatory?
Confirming Agreement To Terms

- Shrinkwrap
- Browswrap
- Clickwrap

Shrinkwrap Agreement

- Buy Now, Terms Later
  - Product and terms and conditions contained in sealed package
  - Upon opening package, purchaser can either agree to the terms and conditions and create binding contract or disagree and return the product
Browsewrap Agreement

• Terms and Conditions Presented To User As a Link or Button That User Can Read Or Ignore
  – Lack of requirement of affirmative agreement to terms
  – User presumed to have agreed to the terms by proceeding further into the website

• Enforceability Questionable
  – *Specht v. Netscape Communications Corp.*
    (U.S. Court of Appeals – 2nd Circuit, 2002)

Clickwrap Agreement

• Customer Presented With Web Page Display of Terms and Conditions and Button or Link Usually Stating “I agree”

• Terms Usually Presented Up Front Or In Same Vicinity as Button or Click Confirming Consent

• Enforceability?
  – Requirement that user scroll through entire agreement before clicking consent?
Security of Electronic Documents

• Availability
• Integrity
  – Ensuring no unauthorized alterations or destruction
  – Inadmissibility of electronic document subject to risk of tampering with or alteration of electronic document

Admissibility Of Electronic Signatures/Agreements In Court Proceeding

• Required To Prove
  – Authentication of sender
  – Signatory’s agreement to terms
  – Security of the signed document
• Electronically Signed Documents Have Been Ruled Inadmissible into Evidence Due To Inability to Prove
  – Authenticity
  – Security
    • High likelihood document could have been tampered with or altered after execution
Landmark Ruling on Admissibility of Electronically Stored Information Including Electronic Signatures

Court Discussed Essential Elements of Effective E-Contracting:
- “Creating and securely archiving and retrieving an audit trail of the entire [Electronically Stored Information] management process, from the steps to verify the identity of the person signing the record all the way through sealing electronically the document and securely archiving and retrieving the e-contract,…”

Court Emphasized That Waiting Until Trial to Start Thinking About Whether an Electronic Contract is Admissible Into Evidence Is WRONG!
- It might then be too late because a company cannot use what it has not kept

The Lorraine Decision Shows That the Quality of the Evidence of Electronically Stored Information is Especially Important to its Enforceability
In Re Vee Vinhnee (9th Circuit Bankruptcy Appellate Panel, 2005)

- American Express Sought to Block Discharge of Its $40,000 Credit Card Claim Against a Debtor
- Creditor Lost Because It Could Not Prove Its Claim
  - American Express produced computer records and a witness
  - The court rejected the records based on American Express’ failure to prove their reliability

Why Is All Of This Important?

- Litigation Over Contracts, Including Electronic Contracts, Often Occurs Several Years After Execution of the Original Contract
  - If there is litigation and the e-signature process provides weak evidence of the signature or agreement to terms, the court may refuse to admit the contract into evidence
  - Contract is then unenforceable
Designing Your Electronic Credit Application

- User Friendly
- Valid and Enforceable E-Signature
- Assure Agreement to Terms and Conditions
- In House or Outside Third-Party

Completing the Electronic Credit Application

- Providing Customer/Applicant Information
  - Company Name
  - Address
    - Physical
    - Billing
    - Shipping
    - Email
  - Phone Number
  - Fax Number
Steps to Complete Credit Application: The Signature

• “Sign Here” or “Initial Here” Tab Presenting Separate Pop-Up Requiring Customer to Adopt and Sign Credit Application
  – Pop-up includes language that by clicking “Adopt” or “Agree”, applicant is agreeing that the signature and initials are an electronic representation of applicant’s signature and initials for all purposes

• Another Pop-Up Asking Applicant to Confirm Signature

Steps To Complete Electronic Credit Application

• Applicant Directed to Electronic Credit Application
  – Instructions for completing credit application
  – Security/Authentication questions
  – Creation of audit trail
  – Applicant asked by way of pop-ups and electronic sticky notes to complete required information fields
  – Make sure applicant must scroll through terms and conditions before clicking assent/"I agree"
Questions?

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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 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.

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.

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 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 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
- 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
- Lowenstein Sandler Retained as Unsecured Creditors’ Counsel in Coldwater Creek Chapter 11 Case 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

- "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
• "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
• "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
• "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
• "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
• "Another Ordinary Course of Business Preference Defense Double Feature," Bruce S. Nathan, Business Credit, July/August 2011
• "Joint Check Agreements: Who's on First?," Bruce S. Nathan, Business Credit, June 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
• "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
• "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
• "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
• "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
• "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
• "Courts Remain Split over Whether a Debtor's Credit Card Payment is an Avoidable Preference," Bruce S. Nathan, Scott Cargill, ABI Journal, 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
• "Section 506(c) Waiver Enforceable; Good News for DIPs and Other Secured Lenders,” Bruce S. Nathan, *American Bankruptcy Institute Journal*, October 2005
• "Real Estate Material and Services Suppliers, Rejoice!,” Bruce S. Nathan, *Business Credit*, October 2005
• "A Standby Letter of Credit Payment Within the Preference Period is Not a Preference,” Bruce S. Nathan, *Business Credit*, June 2005
• "Critical Vendor Orders After Kmart: A New Lease on Life,” Bruce S. Nathan, *Business Credit*, May 2005
• "Reclamation Rights vs. Floating Inventory Lien: A Victory At Last!,” Bruce S. Nathan, *Business Credit*, April 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
• "A New Defense Against Preference Claims?,” Bruce S. Nathan, Scott Cargill, *Credit Today*, October 2004

“Are Reclamation Claims Heading for Oblivion Where the Debtor Has a Secured Inventory Lender?,” Bruce S. Nathan, Business Credit, September 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

“Critical Vendor Payments Denied by Kmart Ruling,” Bruce S. Nathan, Scott Cargill, Lowenstein Sandler, April 2004

“Consignment the Right Way: File a UCC Financing Statement,” Bruce S. Nathan, Business Credit, 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


“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
Practice

Chair, Lending and Finance Practice

It’s no surprise that clients and colleagues are always asking to work with Lowell Citron on complex financing deals and workouts: His pragmatic approach to getting deals done, coupled with his extensive finance and economics backgrounds, gives him a keen understanding of issues important to businesspeople. Lowell’s acumen for finding creative solutions to complex issues often bridges the gap to successful transactions for a wide range of commercial clients, including hedge and private equity funds, large operating companies, REITs, major investment banks, money center financial institutions, and commercial finance companies.

Lowell’s work typically involves him in the structuring and closing of cash flow transactions, acquisition financing, asset-based financing transactions, Term B loans, leveraged loans, bankruptcy puts, recapitalization, mezzanine loans and convertible debt financing. He also advises clients on real estate finance transactions, mortgage warehousing transactions, bank workout transactions, debtor-in-possession financings, trade finance transactions, factoring arrangements and mortgage repurchase transactions.

He also uses his strong people and teaching skills as co-chair of the New York office’s summer program and his strong interest in charitable causes as an active member of the Pro Bono Committee.

Education

- Fordham University School of Law (J.D., 1994), cum laude, Order of the Coif
- State University of New York at Binghamton (B.A., 1991), Honors in Economics

Affiliations

- Association for Corporate Growth, Member
- Association of Commercial Finance Attorneys, Member
- New York State Trooper Foundation, Member
- Birchwood Civic Association of Jericho, New York, Board of Directors
- Long Island Association of Football Officials
- Valley National Bank Advisory Council
Representative Experience

- Served as lead counsel for the ad hoc committee of bondholders under Global A&T Electronics (GATE) 10% Senior Secured Notes due 2019.
- Represented Cambium Learning Group, Inc., and its subsidiaries in a $175 million Rule 144A bond offering and in the company’s concurrent entry into a $40 million revolving loan facility with Harris N.A.
- Represented Indorama Ventures Public Company Limited (IVL), a company listed on the Stock Exchange of Thailand, in its $420 million acquisition of the polyester manufacturing facilities of Invista. Also represented Auriga Polymers Inc., a subsidiary of IVL, in the negotiations of a $110 million acquisition loan facility from a commercial bank and a $90 million revolving loan facility from Regions Bank, the proceeds of which were used to acquire and operate the manufacturing facilities.
- Represented Tower Automotive Inc. in connection with the restructuring of approximately $500 million of debt facilities, including a Rule 144A high-yield offering, domestic and foreign asset-based and cash flow financing facilities, and a letter of credit facility.
- Represented NextWave Wireless in its acquisition by AT&T, including the purchase and redemption of NextWave’s $1.1 billion in secured notes.
- Represented the lender, as administrative agent and lead lender, in a $54 million asset-based loan to a manufacturer of engine components to finance the acquisition of an entity in a related industry.
- Represented the administrative agent and lead lender in a $44 million asset-based loan to a plastics manufacturer. The facility included a revolver with a letter of credit sublimit supported by a borrowing base consisting of domestic and foreign receivables and inventory, and a term loan based on equipment located in Mexico. The credit was supported by a limited guarantee of the Export-Import Bank.
- Represented the administrative agent and lead lender in a $35 million secured working capital facility for a lighting manufacturer and its subsidiaries. The facility included a revolver with borrowing availability determined by a borrowing base consisting of eligible receivables, eligible inventory and the available stated amount of a credit-support letter of credit issued by a foreign bank, as well as several term loans based on equipment and real estate.
- Represented the administrative agent and lead lender in a $180 million secured cash flow loan facility that included a revolving credit facility, term loans and an ESOP loan. The transaction involved a corporate reorganization, several acquisitions and the establishment of an ESOP. The collateral consisted of all assets, including real property located in 36 states and the shares of stock owned by the ESOP.

Articles/Interviews Featuring Lowell A. Citron

- Lowenstein Sandler is advising Diligent Corporation, the leading provider of secure online collaboration and document sharing solutions, in its definitive agreement to be acquired by Insight Venture Partners. February 14, 2016
- Lowenstein Sandler is representing Pernix Therapeutics Holdings Inc., a specialty pharmaceutical company, in its acquisition, announced March 10, 2015, of the Zohydro® ER Franchise from Zogenix Inc. April 24, 2015
- Lowenstein Sandler is representing Covis Pharma S.á.r.l and Covis Injectables S.á.r.l, in connection with the announcement of their all-cash $1.2 billion sale of assets to Concordia Healthcare Corp. April 21, 2015
- Lowenstein Sandler Represents TRANZACT in Majority Investment October 10, 2014
• Lowenstein Sandler represented long-time client, Bel Fuse Inc., in connection with the acquisition of the Power One Solutions business from ABB. June 19, 2014
• Lowenstein Sandler Represents NextWave Wireless in Planned Acquisition by AT&T August 2, 2012
• Firm Represents Cerberus Portfolio Company Guilford Mills in M&A Deal Valued at $257 Million June 2012
• Firm Represents SNL Financial in Leveraged Recapitalization by New Mountain Capital October 10, 2011
• Lowenstein Represents Ipreo in its $425M Sale to Kohlberg Kravis Roberts & Co. From Firm Client Veronis Suhler Stevenson May 2011
• Lowenstein Represents Cambium Learning in $520M Acquisition of Publicly Traded Voyager Learning Company December 2009
• Lowenstein Sandler PC Bolsters Tech and Corporate Practices with Arrival of Three New Members November 9, 2006

Publications


Bar Admissions

• 1995, New York