

CUTTING EDGE PREFERENCE ISSUES

Presentation For AFTERMARKET VOLUME CREDIT GROUP: ABCD MOTOR CREDIT ASSOCIATION

Sponsored By MEMA FINANCIAL SERVICES GROUP

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OVERVIEW

Managing Preference Risk

- Determining Preference Risk Early On
- Understanding How the Preference Game Is Played?
 - Understanding elements of preference claim and defenses
 - Understanding timelines re assertion of preference claim
 - Understanding Your Moves



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;
 - Presumed for transfers during 90 day preference period

Preference: Elements of Claim (*cont'd*)

- Made:
 - 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

Ordinary Course of Business Preference Defense

- New Value
 - Creditor extending credit to debtor after payment, that was not secured and not paid by an otherwise unavoidable transfer
- Ordinary Course of Business: 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 either
 - Was made in the ordinary course of business or financial affairs of the debtor and the creditor (subjective); OR
 - Was made according to ordinary business terms (objective)
- Very Fact Based

RECENT DELAWARE AND OTHER COURT DECISIONS IMPACTING SUBJECTIVE 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*: recent 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

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

- 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 of Business Defense – Subjective Component Decision: Sparrer Sausage Company, United States Bankruptcy Court, Northern District of Illinois

- Court Stated Baseline Historical Payment History Should Be “Before the Debtor Began Experiencing Financial Difficulties,” Which Might be “Well Before” the Preference Period
- Court Refused to Consider Portion of Payment History Within 7 Months of Start of Preference Period
- Shades of *Circuit City*?

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

Tips For Proving Subjective Component of Ordinary Course of Business Defense

- 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 BUSINESS TERMS DEFENSE

Ordinary Business Terms: Introduction

The OBT Defense is Substantially Underutilized!

- Survey says! How many here have used the ordinary business terms defense compared to subjective ordinary course of business and new value?
- Results of prior surveys
- Reported and unreported decisions
 - Last 24 months (OCB – 78; NV – 67; OBT – ??)
- Personal experience

Ordinary Business Terms: Introduction

New Old OCB (Defn 2005)

Debt incurred in ordinary course of Debtor and Supplier's business

- AND -

Payment was made in the ordinary course of business of Debtor and Supplier

**- AND -
- OR -**

Payment was made pursuant to ordinary business terms

Ordinary Business Terms: Introduction

Independent,
stand alone
defense

Defense (as of 2005)

**in ordinary course of Debtor and
Supplier's business**

- AND EITHER -

**made in the ordinary course of
business of Debtor and Supplier**

- OR -

Payment was made pursuant to ordinary business terms

Ordinary Business Terms: Evolution of Defense

Powerful, Independent Defense.

- Stands on equal footing with separate “subjective ordinary course of business” defense, and
- May be used even if there is a prior course of dealing between the parties, and the transfers at issue deviate from that prior course of dealing.

Ordinary Business Terms: Make it Work for You

Ordinary Business Terms generally construed by courts as:

- Basic definition. A range of terms that encompasses the practices in which firms similar in some general way to the creditor in question engage. See *In re Tolona Pizza Products Corp.* (7th Cir. 1993).
- Real opportunity. Only dealings so unusual, idiosyncratic, or aberrant as to fall outside that broad range should be deemed extraordinary and therefore not within “ordinary business terms.”

Ordinary Business Terms: Make it Work for You

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- Real opportunity. Only dealings so “**unusual**”, “**idiosyncratic**”, or “**aberrant**” as to fall outside that broad range should be deemed extraordinary and therefore not within “ordinary business terms.”
- Relationship. The longer the defendant’s relationship with the debtor, the more variance allowed in credit terms from the industry norm.

Ordinary Business Terms: Prove It

Flexible Standard of Proof:

- Ordinary business terms may vary widely from industry to industry.
- Creditor need not show the existence of some single set of business terms.
- Even changing business terms for distressed C/S may not take you out of OBT (in most circuits).
 - a) Changing credit limits; shortening credit terms
 - b) May be okay, if common in the industry
- Note flexibility of OBT defense.

Ordinary Business Terms: Prove It

Flexible Standard of Proof:

- Bad Start. Soon after making OBT an independent defense, one court required evidence of:
 - (i) standard in debtor's industry;
 - (ii) standard in creditor's industry; and
 - (iii) business standards common to all business transactions in all industries.

Difficult to Prove

Ordinary Business Terms: Prove It

Flexible Standard of Proof:

- Bad Start. Soon after making OBT an independent defense, one court required evidence of:
 - (i) standard in debtor's industry;
 - (ii) standard in creditor's industry; and
 - (iii) business standards common to all business transactions in all industries.
- Helpful Evolution. Most courts now look solely to business standards in the **creditor's** industry (i.e., standards encountered by competitors of the creditor/defendant). **Much easier to establish!**

Ordinary Business Terms: Prove It

Elements of Proof:

Defendant/creditor must prove:

1. Relevant Industry
2. Payment Consistent with Industry Practice

Ordinary Business Terms: Prove It

Elements of Proof:

Relevant Industry. Who else would the debtor go to for the same or similar goods?

- a) Same product
- b) Same geographical area

See, In re Gulf City Seafoods, Inc. (5th Cir. 2002).

Ordinary Business Terms: Prove It

Elements of Proof:

Payment Consistent with Industry Practice

- Are the transfers at issue ordinary in relation to industry standards in terms of:
 - timing,
 - amount,
 - manner, and
 - circumstances
- Similar elements as subjective OCB

See, e.g., In re Bridge Information Systems, Inc. (8th Cir. 2006).

Ordinary Business Terms: Prove It

How Do You Prove Your OBT Case?

Can I get a Witness?

- Expert. Evidence might require engagement of an expert in the relevant industry who can testify as to industry standards.
 1. Anyone with industry experience – credit professional recently left industry or retired; credit group leader
 2. Financial advisor – expert may rely on hearsay
- Creditor Employee. Evidence might also be presented by transferee's employee, but must be based on **first-hand knowledge** to be considered competent evidence.
- Need Relevant Evidence. Courts will reject very general statements about what is the relevant industry, and what are the payment norms of that industry.

Ordinary Business Terms: Prove It

SOLUTIONS

~~PROBLEMS~~



Issues with Proof

- Competitor/Industry information.
- Expert witness.
- Using OBT in early settlement negotiations.
- Relatively new, stand-alone defense (since 2005).
Case law still developing; some uncertainty in how a court will apply it (this cuts both ways).

Ordinary Business Terms Information Sources

- MEMA Financial Services Group
- Credit Research Foundation – National Summary of Domestic Trade Receivables
- Risk Management Association – Annual Statement Studies
- S&P Capital IQ
- D&B Industry Reports
- CreditRiskMonitor (www.crmz.com)
- Trade Associations
- American Society of Association Executives (www.asaenet.org)
- 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



Availability of “ordinary business terms” as an independent defense, significantly increases the creditor/defendant’s settlement leverage.

Ordinary Business Terms Defense



OBT Practice Tips



- Independent. OBT defense can be used on a stand-alone basis, and in conjunction with any other defense.
- Negotiations. Use OBT early in the negotiation process to: (i) separate you from the other defendants; and (ii) raise the stakes: plaintiff has to retain an expert.
- Awareness. Be aware of credit and payment practices in your industry, and don't stray too far outside the mainstream, or risk losing an OBT defense.
- Data. Develop industry information sources to back up your OBT defense.

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**“Sometimes I wear this in court.
It’s my frivolous law suit.”**



LOOSE LIPS SINK SHIPS

THE SMOKING GUN IN YOUR FILE THAT SINKS
ORDINARY COURSE OF BUSINESS PREFERENCE DEFENSE

Subjective Ordinary Course of Business Preference Defense – Smoking Guns

- 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)

Smoking Guns in Vendor's/Debtor's File

- Vendor – “Based on future looking 12 month sales/dcm **we need to move your credit limit down to \$10.5M effective next week.**”
- Vendor – “As a reminder, **we will be enforcing the new LOC \$10.5M starting this week.** Please insure we revise our weekly spreadsheet accordingly.”
- Debtor – “I am also aware that Vendor will be reaching out to Debtor next week to discuss **new restrictions on the credit line heading into the holidays.**”

Smoking Guns in Vendor's/Debtor's File

- Vendor – “As I mentioned on the call, we already offer a prompt pay discount. **We are willing to offer an additional discount of \$50k on the \$9 million of paydowns required to go from your current credit limit to the \$2m limit.** Administratively we will issue a credit to cover this at the end of December. I think this is cleaner than creating a situation where invoice amounts are altered.
- Vendor – “Thanks again for your time this afternoon. As mentioned, **our plan is to limit our exposure to \$2m by mid-December.** In order to do this, the following paydown calendar must be used:”

<u>Date</u>	<u>Credit Limit</u>	<u>Add'l Paydown</u>
17-Nov	9	2
24-Nov	7	2
1-Dec	5	2
8-Dec	3	2
15-Dec	2	1

Smoking Guns in Vendor's/Debtor's File

- Debtor – **“We can’t allow these guys to bully us** – we need to offer our proposal to get them to 6-7 mm by xmas – 2mm by mid Dec is a joke.”
- Debtor – “I just got off the phone with [Vendor], and reiterated our disappointment and surprise at the size of their credit contraction. **I stressed to him that we were not experiencing similar pressures from our other vendors,** and that we were optimistic about our chances of procuring additional financing if our holiday expectations were not met. Therefore – and in light of our \$2M good faith payment made last week – I asked for a reconsideration of this decision.”
- Debtor – **“I just got a call from [Vendor], who is now threatening shipment cut-off if he doesn’t see his wire payment this morning.** Let me know if you want to release the wire this morning.”

Smoking Guns in Vendor's/Debtor's File

- Vendor – “Please find attached all invoices that are due for payment from [Customer]. They are all past or nearly past 60 days. I believe you were to make payment a few days ago which we are yet to receive. Please can you tell me the status of the payment and when we shall be receiving it. **Unfortunately until the invoices are paid the [Customer] account will be put on a temporary stop.**”

Smoking Guns in Vendor's/Debtor's File

- Vendor – “We will need to speak to our attorney before negotiating further the terms of the forbearance agreement...**but we must have another \$500K wire transferred by 3PM today to keep the services on.**”
- Debtor – “**No problem. I will have the \$500K wired today.**”
- Vendor – “Have left you a couple of voicemails. The payment due on Wednesday was not made. Our current exposure to you is over \$10m, even though we have a stated credit limit of \$3m. **We are in a position now where orders will not be shipped if the payment due is not made this morning.**”

Smoking Guns in Vendor's/Debtor's File

- Vendor – **“We need to incorporate changes into your weekly processes starting next week: daily balances can't go above the established credit limit (\$3M). I would recommend Mon and Wed wires”**
- Debtor – “Please provide confirmation and amount of the required wire this morning as soon as possible. I'll contact you later to discuss how we'll need to revamp our weekly payment process.”

Smoking Guns in Vendor's/Debtor's File

- **Vendor's CFO** – “This shipment cannot go out until we approve as we do not have available **credit line to cover this** at this time. We are following with Debtor for check in transit information.”
- Vendor – “Right now we have \$1,209K available since we are allowed a 10% override waiting for #'s. **If we can confirm the \$1.3M was sent overnight on Friday, we can release another \$1.3M against that as well.**”

Smoking Guns in Vendor's/Debtor's File

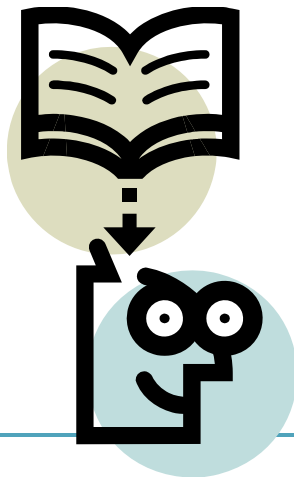
- Vendor – **“Subject: Orders on Credit Hold -- Have you let them know that [Debtor] is essentially on credit hold until they call back? *I have this sick feeling that no one above the directors on their side realizes that shipments have stopped...*”**
- Vendor – **“Subject: Credit Line Hold? - Do we still have product on credit hold? If so, what is the current situation with orders on hold and can we release anything?”**
- Vendor – **“Can we release the balance of the credit hold based on this new check?”**

Smoking Guns in Vendor's/Debtor's File

- Vendor – **“We need a list of products that are on credit hold... I need to work with the [Customer's] buyers to determine what to release ASAP.”**
- Vendor – **“Nothing currently in credit hold can be released.** We need to prioritize which ones should be released first once we have approval to increase exposure.”

Tips – Consider These Points

- Be Careful When Sending E-mails and Other Communications and Preparing Notes for Your File
 - Anything you e-mail or otherwise transmit to the debtor can be used against you
 - Any notes in your credit file can be used against you
 - All discoverable in litigation
 - Deleting “bad” e-mails and/or notes is NOT the answer!



**RISK OF LOSS OF NEW VALUE PAID
UNDER CRITICAL VENDOR ORDER,
PER ALLOWED SECTION 503(B)(9)
ADMINISTRATIVE PRIORITY CLAIM
AND ON A FULLY COLLATERALIZED
LETTER OF CREDIT**

New Value Defense - Introduction

- Congress wants to encourage suppliers to continue extending credit to troubled customers
- Goal is to prevent bankruptcies
- Accordingly, if you shipped goods on credit **after** receiving an alleged preferential transfer, then you may have a New Value Defense

New Value Defense - Introduction

For Example:

Debtor pays creditor during preference period –	\$10,000.00
Creditor ships new goods on credit –	<u>(\$8,000.00)</u>
Net preference exposure –	<u>\$2,000.00</u>

The New Value Defense is \$8,000.
And of course, it's not that "simple."

New Value Defense – Overview of Limitations

- Of course, it is not quite that “simple.”
- Limitations to New Value Defense:
 - a) Extension of credit cannot be subject to security interest
 - b) Certain payments add complexity:
 - “Paid v. Unpaid” New Value
 - 503(b)(9) Claims
 - Critical Vendor Payments
 - Letter of Credit Drawdown

New Value Defense – Complexities

Overview

- “Paid v. Unpaid” New Value
- 503(b)(9) Claims
- Critical Vendor Payments
- Letter of Credit Drawdown

New Value Defense – Complexities

Paid v. Unpaid New Value

What is the impact on the New Value Defense if a subsequent extension of credit is paid?

New Value Defense – Complexities Paid v. Unpaid

Check Receipt Date	Check Amount (Alleged Preferential Payment)	Invoice Number	Invoice Date	Invoice Amount (New Value)	Net Preference
02/18/12	\$2,500				\$2,500
		3030	02/21/12	\$5,500	\$0
		4155	03/16/12	\$7,000	\$0
03/20/12	\$2,500				\$2,500
		5789	04/10/12	\$5,000	\$0
04/14/12	\$5,500				\$5,500
		6324	05/01/12	\$3,000	\$2,500
05/17/12	\$10,000				\$12,500
NET PREFERENCE				\$12,500	

New Value Defense – Complexities Paid v. Unpaid

Check Receipt Date	Invoice Amount (New Value)	Net Preference
02/18/12		\$2,500
	\$5,500	\$0
	\$7,000	\$0
03/20/12		\$2,500
	\$5,000	\$0
04/14/12	\$5,500	\$5,500
	\$3,000	\$2,500
05/17/12	\$10,000	\$12,500
NET PREFERENCE		\$12,500

What if the invoice in red is paid?

New Value Defense – Complexities Paid v. Unpaid

Check Receipt Date	Invoice Amount (New Value)	Net Preference
02/18/12		\$2,500
	\$5,500	\$0
	\$7,000	\$0
03/20/12		\$2,500
	\$5,000	\$2,500
04/14/12	\$5,500	\$8,000
	\$3,000	\$5,000
05/17/12	\$10,000	\$15,000
NET PREFERENCE		\$12,500 \$15,000

What if the invoice in red is paid?

New Value Defense – Complexities

- Can I include in my New Value Defense extensions of credit that were actually paid pre-petition?
 - a) Yes: 4th, 5th, and 9th Circuits
 - b) No: 7th, and 11th Circuits
 - c) Maybe: 3rd Circuit (older Court of Appeals case says no, but newer cases imply “yes”)
 - d) Maybe: 8th Circuit (appears to be leaning towards “yes”)

New Value Defense – Complexities

- What if the “New Value” extensions of credit are paid post-petition?
- Doesn't the automatic stay prevent post-petition payments of pre-petition debt?

New Value Defense – Complexities

- Suppliers sometimes receive post-petition payments on pre-petition debts due to:
 - 503(b)(9) payments
 - Critical Vendor payments
 - Letter of Credit drawdown
- Do these payments limit or reduce the amount of the New Value Defense?

New Value Defense – Complexities

503(b)(9) Payments

Bankruptcy Code section 503(b)(9) gives creditors an administrative expense claim for goods received by the debtor in the 20 days prior to the petition date.

Which means:

1. Creditor gains a priority claim (on a par with attorneys' fees); payable no later than effective date of a confirmed plan.
2. Creditor is potentially paid post-petition for new value delivered pre-petition.

New Value Defense – Complexities

503(b)(9) Payments

Question: Does the new value count if it's paid post-petition under Section 503(b)(9)?

New Value Defense – Complexities

503(b)(9) Payments

Check Receipt Date	Check Amount (Alleged Preferential Payment)	Invoice Number	Invoice Date	Invoice Amount (New Value)	Net Preference
02/18/12	\$2,500				\$2,500
		3030	02/21/12	\$5,500	\$0
		4155	03/16/12	\$7,000	\$0
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04/14/12	\$5,500				\$5,500
		6324	05/01/12	\$3,000	\$2,500
05/17/12	\$10,000				\$12,500
NET PREFERENCE					\$12,500

New Value Defense – Complexities

503(b)(9) Payments

Check Rec Dt	Check Amt	Invoice Amount (New Value)	Net Preference
02/20/12			\$2,500
		\$5,500	\$0
		\$7,000	\$0
03/20/12			\$2,500
		\$5,000	\$0
04/14/12			\$5,500
		\$3,000	\$2,500
05/17/12	\$10,000		\$12,500
NET PREFERENCE			\$12,500

What is the impact of the invoice in red being paid as a 503(b)(9) claim?

New Value Defense – Complexities

503(b)(9) Payments

Question: Does the new value count if it's paid post-petition under Section 503(b)(9)?

- **Yes.** 503(b)(9) payments do not reduce New Value Defense [*Commissary Operations v. Dot Foods, Inc.*]
- **No.** 503(b)(9) payments reduce New Value Defense [*Circuit City Stores, Inc. v. Mitsubishi Digital Elec. Am. Inc.*; *TI Acquisition, LLC v. Southern Polymer, Inc.*]

New Value Defense – Complexities

Critical Vendor Payments

- Judicial Development. Some courts authorize payment of the pre-petition claims of certain vital suppliers, or so-called “critical vendors,” whose goods and services are deemed by the debtor to be absolutely critical to the debtor's ability to reorganize.
- Impact. Obtaining critical vendor status essentially enables a vendor to convert a pre-petition, unsecured claim (often paid only cents on the dollar) to a post-petition, administrative claim (more likely than not paid in full).

New Value Defense – Complexities

Critical Vendor Payments

Question: Does the New Value count if it's paid post-petition as a “critical vendor” payment?

New Value Defense – Complexities

Critical Vendor Payments

Question: Does the New Value count if it's paid post-petition as a “critical vendor” payment?

- **Yes.** *In re Freidman's Inc.* (3rd Cir.) – Holds that invoices paid pursuant to a critical vendor order may constitute new value; post-petition payments should not affect a creditor's new value defense. Payments were also “court authorized.”
- **Yes.** *In re Phoenix Rest. Group, Inc.* (Bankr. M.D. Tenn.) – Same; plain language of section 547 closes preference window on the petition date.
- **Yes.** *In re Murray, Inc.* (Bankr. M.D. Tenn.) – Same; post-petition payments should not affect new value any more than post-petition shipments should count as new value.

New Value Defense – Complexities

Letter of Credit Drawdown

Question: Does the New Value count if it's paid by a drawdown on a Letter of Credit?

New Value Defense

Letter of Credit Drawdown

Question: Does the New Value count if it's paid by a drawdown on a Letter of Credit?

Maybe.

In re New Page Corporation (D. Del.)

- Court considered, but failed to determine, whether goods paid for pursuant to drawdown on letter of credit (LOC) were eligible as new value.
- LOC is not property of the debtor's estate, but collateral pledged as a security interest for LOC is.
- Drawdown on LOC reduced value of property of the estate by triggering repayment of draw and associated fees.

New Value Defense

Summary

Reduces New Value Defense?	Current Status of the Law
Paid v. Unpaid New Value	Subject to debate, modern trend is that paid new value counts, and 3 rd Circuit (including Delaware courts) leaning that way
503(b)(9) Payments	Subject to debate
Critical Vendor Payments	Generally, new value counts, but likely subject to debate
Letter of Credit Drawdown	Subject to debate

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 that post-petition payments do not hinder new value defense.

MANAGING BANKRUPTCY PREFERENCE RISK

Establish A Systematic Response to Bankruptcy Filings

- Have An Action Plan and/or How To List
 - Define what actions are required by your company
 - Credit Actions such as changing terms or credit lines
 - Putting a hold on future orders
 - Collecting A/R Data on Customer Involved
 - Notification and/or Review with Management and Sales
 - Amount of Claim (loss to your company)
 - Additional Exposure (Preference)
 - Review options
 - Lead the Development of a Strategy

Preference Exposure

- Review Past Practices For Possible Risk
 - Terms changes or payment behavior
 - Change in how payments were made
 - Collection procedures
 - Any other activity not considered normal business practice or according to policy
- Advise Management of Possible Exposure
 - Explain Preference and Defenses
 - Normal Course
 - New Value
 - Contemporaneous Exchange
 - Review possible scenarios worst case to best possible.
 - Then odds and likely outcome

Preference

- How the Game is Played!
 - Difference Between
 - Chapter 11 Reorganization
 - Chapter 7 & liquidating 11
 - Preference Claims
 - Commencement of Avoidance Actions
 - Statute of limitations
 - Settlement Negotiations
 - Litigate

Prepare to Defend Your Company

The Preference Checklist

- At Time of Bankruptcy Filing
 - Download and save all electronic files of payment history up to two to three years before the commencement of the 90 day preference period.
 - Save invoice copies and proofs of delivery for all items in payment history
 - Pull Statement of account(s) and all unpaid invoices and proofs of delivery
 - Pull credit file, including credit application, contracts, if any, and all financial information available. Including notes in file, correspondence and preserve all emails.

The Preference Checklist

- Response to Preference Demand Letter
 - Do not ignore the demand
 - Request a list of all checks that make up the preference claim and copies of cancelled checks or proof of wire transfers with remittance instructions
 - Check whether all payments claimed as preferences were actually received. Watch for NSF, Return to maker, etc checks
 - Statute of Limitations: Determine whether the statute of limitations has expired or when will it expire.
 - Preference claims less than \$5,850 for bankruptcies filed before 4/1/013 and \$6,225 for cases filed on or after 4/1/013, a preference lawsuit cannot be commenced

The Preference Checklist

- Pre-suit Discussions
 - Review with management strategy to defend claim
 - Develop a game plans and negotiation thresholds
 - Consult with your attorney
 - Communicate defense to trustee
 - Pre lawsuit discussions might not happen if close to expiration of statue of limitations

The Preference Checklist

- Receipt of Preference Summons and Complaint
 - Consult with your attorney
 - Determine answer deadline (usually 30 days)
 - Try to obtain an extension of time to answer the complaint to provide an opportunity to demonstrate defenses and resolve lawsuit.
 - Immediately refer to counsel if your company is unable to obtain an extension of time to answer complaint or a default has been entered
 - Continue negotiations

Q & A

Questions?

Speaker Bio – Joseph M. Coleman

Joseph M. Coleman

Director

Practice Area(s):

Insolvency, Bankruptcy and Creditor Rights

College: Creighton University

Law School: Southern Methodist University

Admitted to the State Bar of Texas: 1985



Mr. Coleman, a founding director of the Firm, chairs the Insolvency, Bankruptcy & Creditor Rights Section, which focuses on corporate and business reorganization and debt restructuring work, as opposed to consumer matters. He has substantial experience representing unsecured creditors committees, lenders, debtors, equity holders, suppliers, trade associations, financial institutions, real estate companies, trustees and examiners in a wide array of pre-bankruptcy workouts and restructurings, reorganization proceedings, assignments for the benefit of creditors, adversary proceedings, foreclosures and virtually all aspects of bankruptcy and insolvency issues and related litigation. Mr. Coleman has represented 37 Creditor Committees in 16 states, confirmed in excess of 12 plans of reorganization representing both private and public debtors, and served as counsel for many lenders and other secured creditors in Chapter 11 and other insolvency-related matters.

Recent Honors: Ranked by Chambers USA: America's Leading Lawyers for Business as being among the top bankruptcy lawyers in the United States (2010 - 2015). Named by peers among the best bankruptcy lawyers in America, listed in The Best Lawyers in America® (Copyright 2013 by Woodward/White, Inc., Aiken, SC) (2003 -- 2015). Named in Texas Super Lawyers® and in Texas Monthly magazines as one of the top bankruptcy & creditor/debtor attorneys in Texas, selected by Law & Politics (2003 - 2014). Selected by D Magazine for inclusion in The Best Lawyers in Dallas list (2012). Selected for inclusion in ALM's Texas' Top Rated Lawyers for bankruptcy (2012). AV®/Preeminent rated by Martindale-Hubbell.

Speaker Bio – Joseph M. Coleman (cont'd)

Representative Matters

- Currently represent Creditors' Committee in Atlanta bankruptcy case involving 4 levels of secured debt, several §363 sales of multi-state companies and significant avoidance actions.
- Equity owner of oil and gas service companies involving 7 bankruptcy cases, 3 state court receiverships and significant related litigation.
- Successful out of court workout, representing contractor in negotiations with bonding company, governmental agencies, lenders, vendors and related parties.
- Represented second-lienholder in New Jersey bankruptcy case, including contested DIP Financing hearing, 18-hour Section 363 sale and related litigation. Case is presently pending.
- Committee in Delaware bankruptcy case concerning U.S. operations of a Japanese company, confirmed committee-directed plan.
- Committee in Connecticut retail bankruptcy case resulting in committee-proposed plan and reduction of over 40 percent of claims through the committee's recharacterization of debt as equity actions against insiders.
- Highest bidder and purchaser of approximately 100 oil and gas leases and related properties out of bankruptcy.
- Committee in biofuel bankruptcy case, including litigation against a 20-member lender group that resulted in settlement with significantly under-secured lenders paying unsecured creditors 15 percent of their claims.
- Successfully defended officers and directors in oil and gas bankruptcy case resulting in court- approved settlement for an amount less than projected legal fees.
- Proposed and confirmed competing plan of reorganization as a means to stop the consummation of a Section 363 sale process and enable the acquisition of a natural gas pipeline transmission company out of bankruptcy.
- Post-Confirmation Trustees in the oil and gas, mortgage, retail and distribution industries.
- Equity holders of a holding company in a Nashville, Tennessee bankruptcy involving restaurants in five east coast states; confirmed plan resulted in equity holders retaining ownership of restaurants, with a vastly improved balance sheet.
- Four and one-half day successful trial in the Texas Rangers bankruptcy case.
- Group of seven golf equipment manufacturers in an out of court workout with a national retail chain resulting in equity funding, significant payment and security interests from formerly insolvent company.
- Represented a publicly traded equity fund in bankruptcy litigation involving intellectual property and attempted recharacterization of debt as equity
- Represented public sports product company in out-of-court acquisition of insolvent licensee to preserve national line of products sold in all 50 states.
- Represented a Fortune 500 company in the acquisition of an international service firm in bankruptcy.
- Official Unsecured Creditors' Committee in a transportation industry bankruptcy comprised of 28 affiliated, publicly traded debtors, over \$75,000,000 in debt represented, pending in the Southern District of Texas.
- Debtor, a publicly traded roll-up of thirteen entities, resulting in the sale of thirteen separate companies in a 120-day period; Dallas, Texas.
- Official Unsecured Creditors' Committee for a national mortgage lender, reported as one of the ten largest bankruptcies in that year. Committee members included Fox Sports, CBS Sports, TNT and Dan Marino; Northern District of Texas.
- Served as counsel for defendants in a \$15,000,000 preferential transfer and anti-trust lawsuit in
- Delaware, resulting in a settlement of less than 5% of amounts sought by plaintiff.
- Official Unsecured Creditors' Committee, owed an aggregate of over \$75,000,000 in 200+ store retail bankruptcy; Central District of California.
- Successfully represented a leading national golf products manufacturer in injunction proceedings in bankruptcy court in Augusta, Georgia.
- Official Unsecured Creditors' Committee and related officer and director litigation in the bankruptcy of a publicly traded distribution company located in Santa Barbara, California.
- Litigation arising from warehouse distributor's bankruptcy, including LBO/Fraudulent conveyance litigation against lender and breach of fiduciary duty causes of action against former owners, Northern District of Illinois.

Speaker Bio – Joseph M. Coleman (cont'd)

Professional Affiliations: Faculty Member American Bankruptcy Institute; Trial Advocacy Program. American Bar Association, Business Law Section. Dallas Bar Association; Corporate Reorganization, Creditor Rights Section, Bankruptcy and Business Litigation Sections. State Bar of Texas; Business Law Section, Bankruptcy Reorganization Committee. Turnaround Management Association.

Admissions: State Bar of Texas. United States Court of Appeals for the Fifth Circuit. United States District Courts for the Northern, Southern, Eastern and Western Districts of Texas.

Recent Publications: Defending Preferential Transfers: Don't Forget the "Other" Ordinary Course Defense – The Ordinary Business Terms Defense, by Joseph M. Coleman and Robert J. Taylor, published in Credit and Financial Management Review, Volume 19, Number 4, Fourth Quarter 2013.

Recent Presentations

Frequent author and speaker on bankruptcy and creditors' rights issues, including publications by Mathew Bender, Callaghan and the Uniform Commercial Code Law Journal.

Consignment: An Option Worth Considering, Presented to Credit 2 B: A Smyth Company, Educational Webinar, Dallas, April 3, 2014.

Speaker, Structured Dismissals and Conversions: The Reality of Dealing with Post Sale Case Administration, 31st Annual Advanced Business Bankruptcy Course, Houston, February 20-21, 2014; Mr. Coleman's Panel Discussion included the Honorable Judge Anthony Davis.

Loan to Own Panel Discussion presented to DFW Chapter of Turnaround Management Association event, hosted by Deloitte-CRG. Mr. Coleman served as "Debtor's Counsel" in the mock trial panel presentation along with William Snyder of Deloitte-CRG as Moderator, tried before the Honorable Stacey G. C. Jernigan – Dallas, Texas, January 23, 2014.

Managing the Meltdown: An Examination of Creditors' Bankruptcy Strategies, Presented to MEMA Financial Services Group, Inc., MFSG 2013 Educational Seminar, Detroit, Michigan, September 18, 2013.

Faculty Member, American Bankruptcy Institute/Turnaround Management Association's 12th Annual Litigation Skills Symposium, Problems in Bankruptcy Litigation and Advocacy, SMU Dedman School of Law – Dallas, Texas, May 21-24, 2014.

[Complete List of Presentations.](#)

Community Activities: Past Chair, Prince of Peace Catholic Community Parish Advisory Council. Coached 25 youth sports teams. Recently completed nine-year term as Trustee of the Catholic Foundation. Founding Board Member, Center for Thomas More Studies, University of Dallas. Founder, Rev. Richard J. Hauser, S. J. Scholarship Fund at Creighton University. Recipient of President's Award, Ursuline Academy High School. Trustee of the Jesuit College Preparatory High School Foundation and Chairman of the Jesuit College Prep HS' Annual Challenge Drive, wherein over \$1 million was raised in less than two months.

Education: Southern Methodist University School of Law (J.D., May 1985); Editor, *Southwestern Law Journal*; member of Phi Delta Phi. Creighton University (B.S.B.A. 1982); Solon E. Summerfield Scholar; member of the accounting honor society Beta Alpha Psi.

Speaker Bio – Richard S. Kulik

Richard S. Kulik, CCE

Westlake, Ohio 44145

Professional Experience

Sherwin-Williams Company - Cleveland, Ohio

\$11 Billion manufacturer/retailer of paint and related products.

1985 to Present

Division Credit Manager - Sherwin-Williams, Paint and Coatings Division **1997 to Present**

- ❖ Directed the analysis / extension of credit and collection management for national, dealer, and contractor accounts for the Consumer Division with annual sales exceeding \$2 Billion.
- Manage a staff of 15 professionals in the United States and Canada, credit, accounts receivable and claims adjustments
- Over 30 years of credit experience

Education / Accreditation

- 1996 Certified Credit Executive accreditation from the National Association of Credit Management
- 1997 Certified Expert Witness in Preference Defense from National Association of Credit Management
- ❖ Attended; Cuyahoga Community College and Cleveland State University
- ❖ National Institute of Credit, certified instructor.
- ❖ NACM/Credit Research Foundation courses taken:
 - Completed The Graduate School of Credit Management in 1996
 - Completed the Mid Career School of Credit Management in 1988

Memberships

- Vice President of the Sherwin-Williams Employee Credit Union 2001 to 2005
- National Association of Credit Management (NACM)
 - NACM Southern Tier – President / COO 2008 to present.
 - Greater Cleveland Chapter – President 2003 to 2005
 - Greater Cleveland Chapter - Chairman 1997 to 2001
 - Chicago Midwest Credit Association - Chairman National Home Center Credit Group 1999-2000

Speaker Bio – Bruce S. Nathan



Bruce S. Nathan
Partner

Tel 212.204.8686 Fax 973.422.6851
E-mail: 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 is co-chair of the Avoiding Powers Committee that is working 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.

Speaker Bio – Bruce S. Nathan (cont'd)

Education

- **University of Pennsylvania School of Law** (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

Speaker Bio – Bruce S. Nathan (cont'd)

- 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

- **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
- **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

Speaker Bio – Bruce S. Nathan (cont'd)

- "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.org*, December 8, 2011
- Bruce Buechler, Bruce Nathan and Paul Kizel are highlighted for representing the Official Unsecured Creditors Committee of Borders Group Inc. On August 10, 2011, Judge Martin Glenn approved the bidding procedures for the sale of Borders' intellectual property and real estate leases., *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 check and balances between debtors' rights and creditors' rights.," *Standards & Poors 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

- "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 Defense 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, Terence D. Watson, *CRF News*, 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
- "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
- "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
- "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 a Good and is Ineligible for Section 503(b)(9) Priority Status and Other Shocking Developments," Bruce S. Nathan, Michael Etkin, David 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

Speaker Bio – Bruce S. Nathan (cont'd)

- **"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, Terence D. Watson, *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, Terence D. Watson, *Credit Research Foundation Journal*, April 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, Richard J. Corbi, *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, Richard J. Corbi, 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, Richard J. Corbi, *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 the "Safe Harbor" Defense to Defeat Preference Claims,"** Bruce S. Nathan, Scott Cargill, *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, *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

Speaker Bio – Bruce S. Nathan (cont'd)

- "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) Administrative Expense 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, *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) Administrative Expense 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) Administrative Expense 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) Administrative Expense 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, *Credit Research Foundation*, October 2009
- "Compelling Postpetition Trade Credit: Navigating Uncharted Waters," Bruce S. Nathan, *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
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