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Risk Mitigation Tools When Unsecured Open Account Terms Are Too Risky

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Overview: What is Credit Insurance?

Credit Insurance Helps Protect Sellers Against the Risks of Extending Credit to their Customers.

- Insurers agree to reimburse the policyholder for unpaid amounts due to a customer's default, insolvency, or in the case of export sales, occurrence of a stated political event.
- Valuable for companies of various sizes/industries, and important to customize policy to protect against company's unique risks (e.g., political risk, services, advertisers, partial finished goods, etc.).
- Like any line of insurance, it is designed to protect against unexpected loss.
- Not intended to make the policyholder whole – deductibles and co-insurance obligations apply.
- Historically used by European companies and domestic companies with overseas sales, where payment enforcement could be problematic.
- Increasingly used by U.S.-based companies to cover domestic sales.

Overview: What Risks Are Covered?

- **Commercial Risks**
  - Insolvency (i.e., bankruptcy)
  - Protracted default
  - <u>But disputed transactions may not be covered or coverage may be conditioned on obtaining a judgment against the defaulting customer</u>.
  - Bankruptcy Preference Risk

Overview: What Risks Are Covered?

- **Political/Country Risks**
  - Customer may be solvent, but unable to pay you because of instability in its home country.
    - Frozen currency inconvertibility
    - Government action, legislation preventing payment
    - War, insurrection, disaster
  - Examples:
    - Greece
    - Russia/Ukraine - Sanctions
    - Venezuela

Credit Insurance: Benefits and Uses

- Protects Against Catastrophic Loss From Large Concentration Accounts
  - For most companies, 80% of business comes from 20% of customers.
- Enhances Credit Information
  - Some insurers maintain extensive databases of the creditworthiness of various companies and industries, monitor accounts, and will alert policyholders about positive and negative developments regarding customers' creditworthiness.
- Improves Access to Financing Due to Lender Reassurance Regarding Policyholder's Ability to Collect Receivable.
- Allows For Credit-Based Sales to New Customers, Without Taking on Full Risk of Unfamiliar Customer's Default.

Overview: Two Basic Approaches to Credit Insurance: “Cancelable” Coverage

- Insurer Acts as an Extension of the Policyholder’s Credit Department.
  - Insurer measures creditworthiness of Policyholder’s customers.
  - Insurer sets discretionary credit limit (“DCL”).
    - Amount depends on policyholder’s credit procedures, loss history, payment terms, etc.
  - Insurer approves credit limits above DCL, if applicable.

Overview: Two Basic Approaches to Credit Insurance: “Cancelable” Coverage

- Credit Limits for Customers are Cancelable – But it’s Not an All or Nothing Proposition.
  - Instead of cancelling credit limits, Insurer may gradually reduce them.
    - Red flag as to future customer bankruptcy
- For ‘Typical’ Cancelable Coverage, Cancelation Applies Only to Goods Shipped/Delivered/Orders Accepted After Notice of Cancellation.
  - But check the policy!

Overview: Two Basic Approaches to Credit Insurance: “Non-Cancelable” Coverage

- Market is moving towards “non-cancellable” coverage
- Insurer is initially underwriting and trusting the Policyholder’s credit management practices.
- Insurer usually “Hands Off” – control lies with Policyholder.
  - Typically there is a larger DCL for buyers than cancelable coverage:
    - Insurer will approve credit limits for larger customers.
    - Insurer **cannot cancel buyer credit limits** during the policy period.

Cost of Credit Insurance

- Typical Cost Factors:
  - Degree of risk the Insured retains: deductible and coinsurance
  - Insured’s sales volume
  - Limits (overall coverage limit; customer credit limits)
  - Customers’ creditworthiness
  - Loss history
  - Collection history/Past Due A/R
  - Insured’s credit practices
  - Location of customers (esp. for overseas buyers)
  - Number of accounts covered & concentration of risk within accounts
  - Insured’s industry

Cost of Credit Insurance

Major Cost Variables are Deductible and Co-insurance

- Co-insurance is a percentage of the overall loss that the policyholder must bear. Specific application will vary by policy.
- Deductible is the fixed amount the policyholder must pay before the insurer starts to pay.
  - Deductibles are generally provided on an aggregate basis.
  - Sometimes policies will have per account deductibles instead.
- May be able to negotiate with the Insurer to recoup deductibles and co-insurance if the Insurer recovers from the customer.
- Order of application matters – co-insurance first or deductible first!

Cost of Credit Insurance

- Example:
  - Claim for $1 million; co-insurance is 10%; deductible is $100,000.
  - Deductible First: Insured recovers $810,000.
    - Subtract $100,000 from $1 million loss = $900,000; apply 10% coinsurance to $900,000.
  - Co-insurance First: Insured recovers $800,000.
    - Apply 10% co-insurance to $1 million loss = $900,000; subtract $100,000 from $900,000.

Understanding a Credit Insurance Policy

- Policy Language Initially Drafted in Insurer's Favor.
  - Best to work with your broker or legal professional to help explain the benefits and pitfalls, as they act as your agents.

Understanding a Credit Insurance Policy

- Policyholders Must be Proactive in Understanding their Policy Before a Claim Arises (Behave as if Uninsured).
  - Insured may have obligations throughout the policy period (e.g., notification requirements, providing A/R past due summaries) that can result in loss of coverage if not met.
  - Insured must understand how the insurance policy intersects with contracts with buyers.
- Negotiate policy terms with the insurer to maximize coverage and <u>avoid uncertainties</u>.

Understanding a Credit Insurance Policy

- Declarations Page
  - First page(s) of policy
  - Summarizes key terms
- Coverage Grant / Insuring Agreement
  - Standardized language
  - Describes the insurance offered
- Definitions
- Exclusions
  - Identifies risks excluded from coverage.
- Endorsements
  - Amendments to the policy – a means to customize coverage.
    - Additional coverage, additional exclusions, other terms (e.g., the approved buyer list)

Understanding a Credit Insurance Policy

<u>Declarations Page</u>

- First page(s) of policy
- Identifies the "Named Insured"
  - Other insureds (e.g., parent, subsidiaries, affiliates) may be listed on endorsements or added via general definitions.
- Premium: Minimum premium; calculation of premium
- Policy Period
- Limits of Liability
- Deductible
- Co-insurance
- Insured percentage

Understanding a Credit Insurance Policy

Coverage Grant

- Also known as the "Insuring Agreement."
- Standardized Policy Term that describes the insurance offered.
  - Language varies based on insurance company.
- Commencement of Coverage: Typical trigger is the date of sale/shipment/ delivery (for goods) or the date services are provided or invoiced (for services), rather than default date.

Understanding a Credit Insurance Policy

Example of Potential Coverage Issues

Insuring agreement:

Insurer will pay "in respect of goods sold and **Dispatched** and **Services Provided** within the **Policy Period** . . . **Insured Loss** in the event of the **Buyer** failing, due to **Insolvency** or **Protracted Default**, to pay you an **Insured Debt** up to the **Policy Amount**."

- "Dispatched" defined to mean the time when:
  - …in the case where the **Buyer** is located in the same country as your country, [goods] physically pass from you into the exclusive physical control of the **Buyer** (which transaction must be completed within the **Policy Period**).
  - **What does this mean? Completed delivery? Delivery to warehouse in which buyer rents space?**
  - **Risk re: drop shipments.**
  - **Risk re: buyer's cancellation of order**

Understanding a Credit Insurance Policy

Definitions

- Policies contain numerous defined terms that explain the scope of coverage.
  - Terms and definitions vary among carriers.
- Definitions impact coverage.

Understanding a Credit Insurance Policy

Common Exclusions

- **No credit insurance policy covers disputes.**
  - "[A]ny bona fide dispute of any kind between the Insured and a Buyer."
  - "[A]ny indebtedness of a BUYER to the Insured [that] is disputed in whole or in part."
  - "This Policy does not cover . . . any loss: which is subject to any form of dispute between you and the Buyer, unless and until each dispute shall have been finally adjudicated in your favor."

Understanding a Credit Insurance Policy

Common Exclusions – Disputed Accounts (continued)

- Seek clarification during negotiation and renewal.
  - Try to provide for insurer's payment of undisputed portion of insured's claim
- Be sure the policy at least provides coverage for disputed accounts once Insured obtains a judgment.

Understanding a Credit Insurance Policy

Common Exclusions (continued)

- Losses because of the Insured's failure to comply with Contract terms or other provisions of law.
  - Keeping current with A/R reporting.
  - Back up documentation for DCL coverage.
  - Known material insolvency issues.

Understanding a Credit Insurance Policy

Common Exclusions (continued)

- Losses from goods sold after seller learns of certain circumstances that may affect a buyer's ability to pay.
  - E.g., Buyer's cash-flow difficulties; past-due accounts
- Losses arising from delivery/dispatch of goods to customers located in certain countries (not approved).
- No coverage for sales to customers in Chapter 11 or other bankruptcy cases.

Understanding a Credit Insurance Policy

Endorsements

- Additional policy forms attached to the "main" policy.
- Endorsements "customize" the standard "main" insurance policy to the needs of the policyholder:
  - Add/Exclude coverage.
  - Impose additional rights or duties upon the policyholder or insured.

Key Issues

Sample Timing & Reporting Requirements

- Notification of customer default:
  - Typically, a policyholder must promptly notify insurer of not just failure to pay, but also circumstances that might precede a customer default.
    - Policyholders should try to negotiate narrow set of conditions that trigger a notification obligation.
- "Claims … must be made within 6 months of the expiration of the Maximum Extension Period, using the Claim form we will provide."
- Waiting too Long to Report Claims may affect the amount that is insured.

Key Issues

Coverage Components To Be Aware Of

- **Sale must be to covered account: policyholder must ensure that sale is to an approved buyer.**
  - Know who you are selling to and invoicing.
  - Beware of sales to entities affiliated with approved buyers.
    - In case law, this has been upheld as basis for denying coverage. Make sure the correct buyer is invoiced.
  - Delta Mills, Inc. v. GMAC Commercial Finance, LLC, (Delaware Bankruptcy – 2009): (factor's credit insurer refuses to pay upon discovery of discrepancy between insured buyer and invoiced buyer [an affiliate], resulting in factor charging loss back to seller).
  - Similarly, sale must be *from* policyholder – not an affiliate not named in the policy.
    - Name each selling entity as additional insured

Key Issues

Coverage Components To Be Aware Of

Preference: Customer Payment Within 90 days of Bankruptcy Filing.

- Are preferences covered in your company's policy?
- Will your company be covered when a preference lawsuit is commenced after you have switched carriers?

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Key Issues

Coverage Components To Be Aware Of

Example of Broad Coverage Term:

- **Refund of preferential payments**
  - In the event you are obliged or forced to return alleged preferential payments . . . You may submit a claim for any subsequent loss you may sustain."
  - Policyholder must meet stated requirements, such as:
    - No knowledge that payment would be treated as preferential;
    - Timely assertion of all defenses available under Bankruptcy Code;
    - Obtain insurer consent to settle.

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Key Issues

Coverage Components To Be Aware Of

Preferences

Example of Narrow Coverage Term:

- "In the event that you receive a request to return an alleged preferential payment(s) . . . Involving a Buyer covered by an insurance policy . . . in effect on the date of Insolvency and provided that a policy has continuously been maintained by you through us, you may file . . . a claim."
- Just as under the policy with a broader coverage term, the policyholder must meet stated requirements.

Key Issues

Coverage Components To Be Aware Of

Preferences

Example of No Coverage:

- No coverage for loss "arising from or related to any Preference claims or demands from insolvency administrators . . . to recover monies paid by the Buyer to you and which monies are defined as a Preference."
  - Since policy also requires strict enforcement of customer credit terms, policyholder should seek removal of this exclusion as enforcing credit terms can give rise to preference liability.

Takeaways

- Policy Should Cover Insolvency, Protracted Default and Political Risk (for International Transactions)
- Know Risks you Want Covered by Policy.
- Know Your Policy to Make Sure it Covers Anticipated Risks.
- If You Have Policy Questions, Seek Clarity and Answers To Make Sure that You are Fully Aware of what you are Agreeing to.
- Seek the Help of a Legal Professional and Broker for the Following:
  - To negotiate new and renewal policy terms.
  - Ensure compliance during the policy period.
  - Help in filing a claim under the policy.

Receivable Puts: What Risks Are Covered?

- Bankruptcy risk covered
- Default payment risk not covered
- Political risk not covered
- Preference risk not covered

Put Agreements

- Buyer's Agreement to Buy the Claim in the Future at Agreed-Upon Price
  - Purchase price could be 100% of the claim or less
  - Protects against customer's default/ bankruptcy filing
  - Shifts credit risk from vendor to third party
- Creditor Must Pay a Nonrefundable Fee
- Usually Covers Pre-Petition Claims
- Amount of Coverage Limits Buyer's Exposure — Total Accounts Receivable Buyer is Obligated to Purchase
- Expiration of Coverage – End Date For Put Coverage

Receivable Puts: Benefits and Uses

- Can Be Utilized to Buy Protection on a Single Name Basis Vs. Portfolio Coverage.
- Focus is On Credits Which are Capped or Limited Through Traditional Credit Insurance Channels.
- Enhances Credit Information
  - Clients have access to the Investment Bank's research and trading platforms to monitor, research and alert them if there are changes within an industry, sector or specific credit.
- Improves Access to Financing Due to Put Provider's Agreement to Purchase and Pay for Claim Should a Credit Event Occur.
- Allows for Credit-Based Sales to New Customers, Without Taking on Full Risk of Unfamiliar Customer's Default.

Put Agreements – Put Events

- Put Event Must Occur for Creditor to Compel Sale of Claim
- Deadline for the Occurrence of Put Events is Usually Specified, After Which the Put Expires
- Make sure Put Events work

Put Agreements – Pre-petition Claim Put Events

- Bankruptcy filing
- Moratorium of payment of claims
- Failure to pay claim: hard to get

Put Agreements

- Closing Conditions Upon Occurrence of Put Event
- Be Sure Closing Conditions are Likely to Occur and Understand Potential Expense of Satisfying Requirements

Put Agreements

- Closing Conditions
  - Presentation of Filed Proof of Claims and prescribed documents evidencing sale (e.g., invoices)
  - Filing of schedules listing claim as undisputed, not contingent or unliquidated in the correct amount
  - Debtor's acknowledgment of claim amount – not within creditor's control
  - Court order allowing claim in the correct amount — this could be expensive to obtain
  - Is there a deadline for creditor to close upon occurrence of a Put Event?

Legal Issues Re: Put Agreement

- Properly Identifying Entities Subject to Put Coverage
  - Problem of customer and affiliated entities: correctly identifying customer
  - Linens 'n Things Horror Story
  - Borders example

Legal Issues Re: Put Agreement

- Where Put Does Not Cover All Accounts, Watch out for Provision Requiring Sale of Most Recent Accounts First
  - Results in put buyer purchasing more valuable Section 503(b)(9) priority claim
  - Opt for trade creditor's choice of accounts to sell
  - Alternative formulations

Legal Issues Re: Put Agreement

- Impact of Bankruptcy Court Order Restricting Trading of Claims
- Carveout "Ordinary Course Charges" from "Disputed" Accounts, Which are Ineligible for Sale Under Put
- Beware of representations of "no preference risk"
- Availability of Multiple Puts?
- Trade Creditor's Ability to Serve on Creditors' Committee

Legal Issues Re: Put Agreement

- Ability to Substitute Undisputed Eligible Receivables For Disputed Eligible Receivables
- Trade Creditor's Obligation to Buy Back Claim
  - Triggering event – occurrence of "Impairment"
    - Definition could be overly broad
    - Seller's inability to assign claim due to a claims trading order should not be an impairment
  - Triggering event should be limited to entry of "Final Order" reducing or disallowing claim
  - Trade Creditor's Ability to Compel a Buyback of the Claim Upon Reversal of Disallowance of Claim
- Trade Creditor Should Control Defense of Objection to Claim

Legal Issues Re: Put Agreement

- Trade Creditor's Continuing Obligations on Their Reclamation and Section 503(b)(9) claims
- Interest charged in event of a Buyback – Usually Negotiable

Put Agreements

- Ascertain Purchaser's Financial Condition
  - Put Replaces Unsecured Obligation of Debtor with Unsecured Obligation of Buyer or Designee
  - Creditworthiness of buyer
    - Trade Creditor should get financial info about buyer to confirm buyer's ability to pay purchase price for the claim when put is exercised

Put Agreements

- Is Put Agreement Assignable?
  - Risk of financially weaker assignee
  - Put Agreement should either not be assignable; should be assignable to an assignee acceptable to trade creditor; or buyer should retain obligation to purchase claim

Consensual Security Interest – Governing Law

- Governing Law Article 9 – Uniform Commercial Code
  - State not federal law
  - May vary by state

Consensual Security Interest – Creation

- Security Agreement Describing Collateral
  - Must be signed or authenticated by Debtor
  - Collateral described by asset category
  - See Purchase Money Security Agreement – Supp. Tab B at pg. 14
- Debtor has Interest in Collateral
- Value Extended to Debtor
  - Trade credit extension
  - Forbearance from collection
- Name of Debtor
  - Correct legal name
  - How to verify
- Authority of Signer

Consensual Security Interest – Perfection

- Perfection
  - Usually by filing UCC Financing Statement
    - See UCC Financing Statement – Supp. Tab B at pg. 27
    - Does not require Debtor's signature
    - File by Debtor's correct legal name
      - Impact of filing against wrong name?
      - Impact of filing against trade name?

Consensual Security Interest – Impact of 2010 UCC Article 9 Amendments

- All 50 states, Puerto Rico and the District of Columbia Have Enacted the 2010 Amendments
- Most Significant Amendment – Proper Name of Individual Debtor on UCC Financing Statement

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Consensual Security Interest – Impact of 2010 UCC Article 9 Amendments

- States Provided 2 Alternatives For Identifying Individual Debtor in UCC Financing Statement:
  - Alternative A: Name on debtor's driver's license (or state issued non-driver identification card) is correct legal name for individual debtor. If debtor has neither, debtor's "individual name" or debtor's surname and first personal name suffice
  - Alternative B: Any one of the following (a) name on debtor's driver's license (or state issued non-driver identification card) (b) debtor's "individual name" or (c) debtor's surname and first personal name
  - Most states have adopted Alternative A

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Consensual Security Interest – Impact of 2010 UCC Article 9 Amendments

- Registered Organizations
  - Debtor's correct legal name based on debtor's name contained in most recently filed Secretary of State Documents
- Change in Debtor's Location
  - 4 month period for re-perfection now applies to both after –acquired property (new) as well as property of debtor existing on date of move
- Debtor that is Successor by Merger
  - Perfection now extends to both property of merged entity acquired within four months of the merger (new) as well as property owned prior to the merger

Consensual Security Interest – Perfection

- Where to file UCC
  - State of Debtor's location
    - State of registration for corporation or limited liability company
    - State of principal place of business for unregistered entity – general partnership
    - State of residence for individual
  - Usually with Secretary of State, but check!
    - Couple of states provide for local UCC filing

Consensual Security Interest – Perfection

- Longevity of UCC Financing Statement
  - Not perpetual
  - General rule: 5 years
    - May vary by state
- UCC Continued by Filing Continuation
  - Must be filed within 6 months prior to expiration

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Consensual Security Interest – Perfection

- Amending UCC
  - Debtor name change
    - Old name seriously misleading
  - Adding/deleting collateral
  - Address changes
- UCC Amendment Form
  - For name changes, must file within 4 months to relate back

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Consensual Security Interest – Priority

- How to Find Competing Security Interests/Liens
  - Do UCC/Lien Search
  - Where?
    - State of Debtor's location
    - State where Debtor's physical assets are located
    - State of Debtor's principal place of business

Consensual Security Interest – Priority

- Priority Rules
  - First to perfect
- Exceptions with Priority Over First to Perfect
  - Purchase Money Security Interest
  - Consignment
  - IRS and Certain Other Statutory Liens

Consensual Security Interest – Purchase Money Security Interest

- Purchase Money Security Interest (“PMSI”)
  - See PMSI Agreement -- Supp. Tab B at pg. 14
  - Security interest granted to seller of goods to secure purchase price
  - Requires compliance with UCC Article 9
  - Priority over prior perfected security interest in inventory by following UCC Article 9 rules for PMSI superpriority status

Consensual Security Interest – Purchase Money Security Interest

- UCC Article 9 Rules for Superpriority Status
  - PMSI Security Agreement signed or authenticated by Debtor
  - Equipment
    - UCC filing within 20 days of receipt by Debtor
  - Inventory
    - UCC Filing before Debtor’s receipt of goods
    - Authenticated written notification to prior secured inventory creditors
    - See PMSI Notice – Supp. Tab B at pg. 24
    - Good for 5 years

Consignment

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

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Consignment

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

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Purchase Money Security Interest/ Consignment – Risks to Consignor

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

Protecting Interest In Goods And Other Collateral When Debtor Files Bankruptcy – Automatic Stay

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

Protecting Interest In Goods And Other Collateral When Debtor Files Bankruptcy

- Risk of Debtor's Use of Secured Creditor's Goods and other Collateral in its Business Operations
- Risk of Loss of Security/Consignment Interest if No Action is Taken
  - Property acquired by debtor post-petition is not subject to pre-petition security interest
  - Consigned goods acquired by debtor post-petition could become subject to chapter 11 Lender's prior security interest

Protecting Interest In Goods And Other Collateral When Debtor Files Bankruptcy

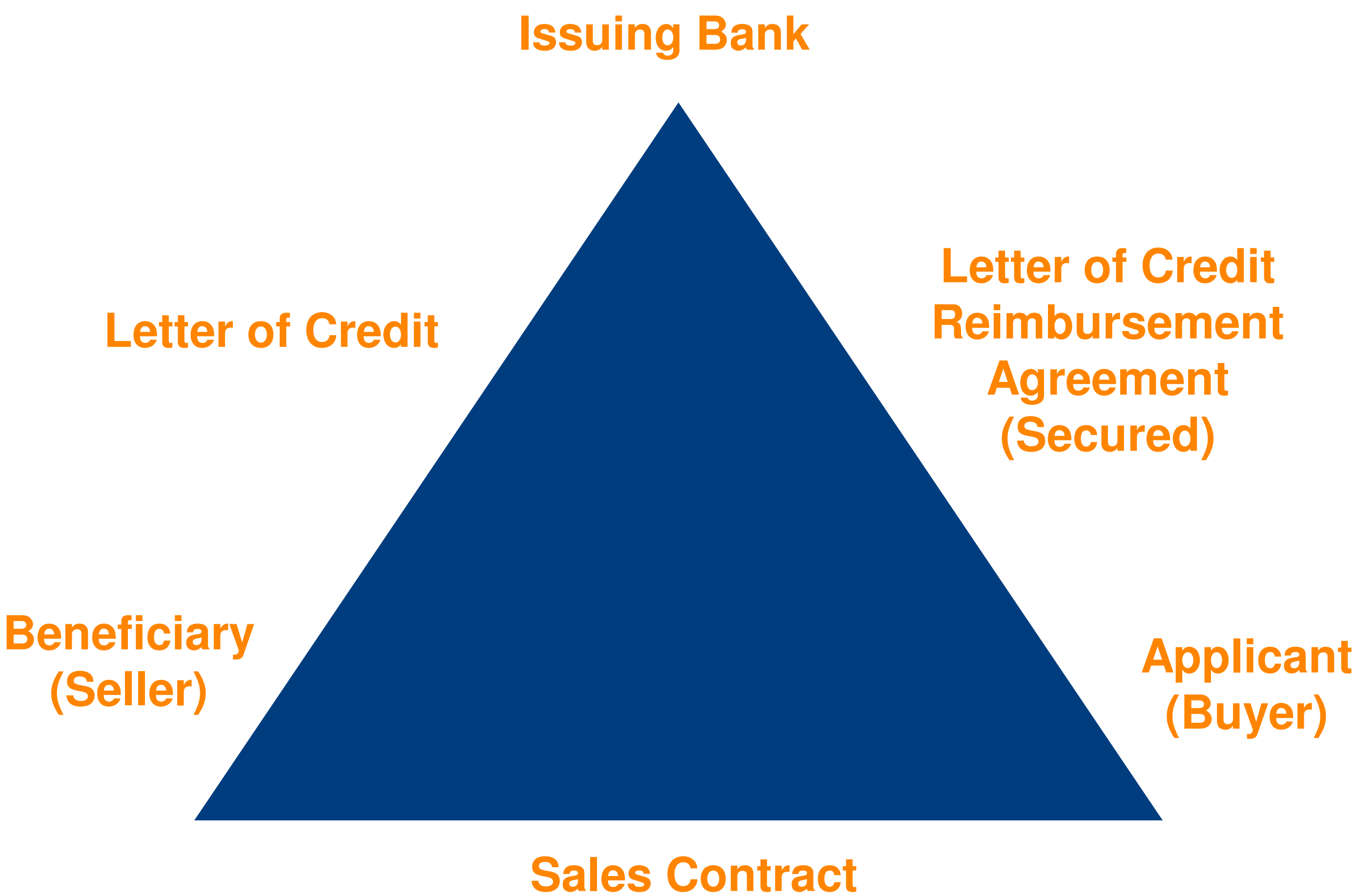
- Given Cooperative Chapter 11 Debtor
  - Secured/Consigned status should be retained in bankruptcy
  - Purchase money security interest priority should be preserved by debtor's consignment paying for the goods and granting priority over Chapter 11 lender providing DIP/Chapter 11 Financing or agreeing to Debtor's use of cash collateral
  - Bankruptcy court approval required

Protecting Interest In Goods And Other Collateral When Debtor Files Bankruptcy

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

Letters of Credit: 3 Separate Contracts

Parties and Contracts



Letters of Credit: 3 Separate Contracts

- First: Contract between Creditor/ Letter of Credit Beneficiary and Debtor/Letter of Credit Applicant
- Example:
  - Sale or service contract

Letters of Credit: 3 Separate Contracts

- Second: Contract between Debtor/Letter of Credit Applicant (For Whose Account Letter of Credit is Issued) and Letter of Credit Issuer
  - Letter of credit issuer's agreement to issue letter of credit
  - Reimbursement agreement
    - Applicant's agreement to reimburse issuer for payments under letter of credit and other fees and charges
  - Security agreement/collateral security for Applicant's reimbursement obligations

Letters of Credit: 3 Separate Contracts

- Third: Letter of Credit – Contract Between Letter of Credit Issuer and Letter of Credit Beneficiary (to Whom Letter of Credit is Issued)
  - Letter of credit issuer agrees to honor upon presentation of complying documents
    - Beneficiary needs to make sure letter of credit requirements can be satisfied
    - Immediate payment
    - Deferred payment
  - Eliminates risk of nonpayment from buyer if letter of credit terms are met
  - Irrevocable Letter of Credit not subject to cancellation prior to its expiration date without beneficiary's written consent

Letters of Credit: Independence Principle

- Each of the Contracts Underlying a Letter of Credit is Independent.
  - Dispute concerning one contract not grounds for relieving parties from obligations under other contracts.
    - Customer dispute under contract not grounds for Issuing Bank's dishonor of letter of credit upon Beneficiary's presentation of required documents.
  - Issuing Bank's inability to obtain reimbursement from Applicant not grounds for dishonor upon presentation of required documents.

Letters of Credit: Independence Principle

- Letters of Credit Deal in Documents
- Standards of Documentary Compliance
  - Strict Compliance – Majority Rule
  - Substantial Compliance – Minority Rule

Letters of Credit: vs. Guaranty

- Distinction From Guaranty
  - Guaranty enforceable based on default in underlying transaction
  - No documentary presentation requirements unless guaranty states otherwise

Letters of Credit: Law

- International Chamber of Commerce (ICC) UCP 600
  - Primarily applies to documentary letters of credit
- ICC International Standby Practices – ISP 98
  - Reflects custom, practice and usage for standby letters of credit
  - Addresses the inadequacies of UCP 600 re standby letters of credit
- Uniform Commercial Code – Article 5

Letters of Credit: Advantages

- Instant Liquidity
  - Compliant letter of credit draw usually honored by issuing bank within a few business days.
- Issuing Bank's Credit Standing
  - Letter of Credit Issuing Bank substituted for or added to credit of Applicant to secure or support underlying obligation
  - Need to know financial standing of issuing bank
  - Request for creditworthy bank to act as "confirming bank"
    - Confirming bank is obligated to pay beneficiary that complies with letter of credit's documentary requirements.
    - Eliminates issuing bank risk of nonpayment

Letters of Credit: Advantages

- Draw Now/Litigate Later
  - By virtue of independence principle, Issuing Bank must honor Beneficiary's presentation of compliant documents.
    - Beneficiary holds funds while Beneficiary and Applicant litigate disputes.
- Bankruptcy Protection
  - Issuing Bank will honor compliant letter of credit drawing, notwithstanding Applicant's bankruptcy filing.
  - Beneficiary can draw under properly drafted letter of credit, notwithstanding automatic stay.
  - Preference risk can be limited.

Letters of Credit: Advantages

- Difficult to Enjoin Letter of Credit Drawings
  - Fraud
  - Irreparable harm
  - No adequate remedy at law
  - Public interest
  - Posting bond
- Timely Dishonor/Statement of Nonconforming Documents Required Upon Letter of Credit Dishonor
  - Issuing Bank must timely dishonor.
  - Issuing Bank must identify all discrepancies when communicating dishonor.

Letter of Credit Amendment

- Extend Expiration Date
- Extend Latest Shipment Date
- Increase or Decrease Amount of Letter of Credit
- Fix Errors
- Need Approval of Applicant
- Fee
- Delay In Issuance

Letters of Credit: Documentary vs. Standby

- Two Types of Letters of Credit
  - Documentary or commercial letter of credit
    - Primary payment vehicle
    - Seller expects to secure payment from Letter of Credit issuing bank
  - Standby letter of credit
    - Backstop/secondary payment vehicle in the event of Applicant's default of its contract with Beneficiary
    - See form of Standby Letter of Credit Tab C at pg. 29

Letters of Credit: Documentary

- Seller/Beneficiary Looks to Issuing Bank not Buyer for Payment
- Draft (Demand for Payment)
  - Sight – payable immediately
  - Time – payable later
- Documents Presented Usually Evidence Sale/Services Transaction
  - Invoice
  - Shipping documents
  - Packing list
  - Insurance documents
  - Other documents

Invoice – Some Questions

- Does the Invoice Conform With All Terms of the Credit?
- Does the Merchandise Description, Including Weight, Quantity, and Price, Conform Precisely To That On The Letter of Credit and Other Documents?

Invoice – Some Questions

- Is the Description In a Foreign Language, If Required By the Letter of Credit?
- Are the Buyer and Seller Denoted Correctly?
- Does Description Of Merchandise And All Other Information Contained on the Invoice Agree With the Information On All Other Documents?

Bill of Lading (“B/L”) – Some Questions

- Are Ocean B/Ls In Negotiable Form If Required By the L/C?
- Are B/Ls “Clean” --That Is, Free Of Any Notation Declaring Defective Goods Or Packaging?
- Do B/Ls Indicate That Merchandise Was Loaded “On Board” Rather Than “Received For Shipment?” If Not, Does the Credit Allow For These?
- Are B/Ls Consigned To the Order Of the Party Prescribed By the Credit?
- Are B/Ls Endorsed Correctly?

Bill of Lading – Some Questions (continued)

- If the L/C Calls for Freight to be Prepaid, is this Clearly Indicated on the B/L?
- Is the B/L Dated Prior to or the Same Date as the Latest Shipping Date Indicated on the Credit?
- If the B/L Indicates Goods are being Transshipped, Does the Credit Allow For This?
- Are B/Ls "Stale"? — that is, Could the Merchandise have Already Arrived at its Destination? Unless the L/C States Otherwise, Banks Must Consider B/Ls Presented More Than 21 days After "On Board" Date as Being "Stale."
- Do B/Ls Indicate the Ports of Shipment and Destination Specified in the Credit?
- In the case of Air Shipments, are these Permitted by the L/C and are Airway Bills Consigned as Stipulated?

15 Most Common Discrepancies in Letter of Credit Presentations

- Letter of Credit Has Expired
- Late Presentation Of Documents
- Late Shipment Of Goods
- Inconsistent Spelling of Parties' Names In Documents
- Terms Of Sale Set Forth in Letter of Credit Not Complied With
- Merchandise Description Does Not Strictly Comply With Letter of Credit Terms
- Partial Shipment Or Transshipment Effected Despite Letter of Credit Terms
- Foreign Language Documents Must Read Exactly As Per Letter of Credit

15 Most Common Discrepancies in Letter of Credit Presentations (continued)

- Documents Are Not Consistent With One Another
- Ocean B/L Issued By Forwarding Agent Unacceptable
- B/L Not Clean
- Insurance Does Not Cover Risks Stipulated in the Letter of Credit
- Insurance Issued After Shipment Date
- B/L and Drafts Not Properly Endorsed
- Drafts Not Completed Properly.

Letters of Credit: Standby

- Beneficiary Looks to Debtor/Customer for Payment
- Standby Letter of Credit as Backstop
- Keep Documentary Requirements SIMPLE!
  - Draft
  - Document showing debtor's failure to timely pay, other default, preference risk, other draw events
- Seller/Beneficiary Should Provide Their Standby Letter of Credit Form

Letters of Credit Do's

- Make Sure Documentary Requirements Can Be Satisfied
  - Do not agree to cumbersome documents or unfavorable terms
- Make Sure Expiration Date Works
- Who is Responsible For Bank Charges?
- Provide
  - Standby Letter of Credit form
  - Documentary requirements for documentary Letter of Credit
- Ask For Draft of Letter of Credit to Review Prior to Issuance to Make Sure Correct
  - Amendment costs money and causes delay

Letters of Credit: Impact of Applicant's Bankruptcy Filing

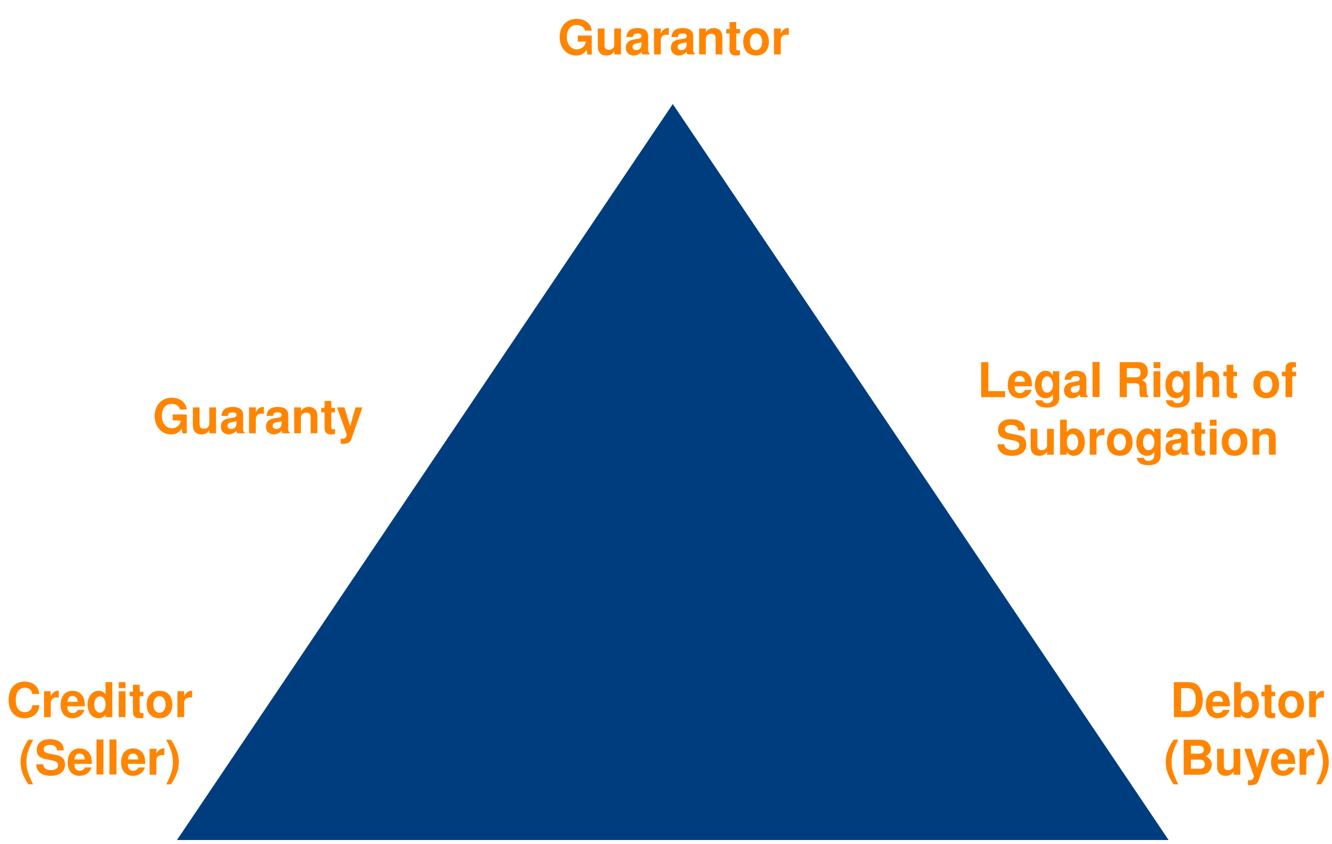
- Beneficiary Can Draw on Letter of Credit, Notwithstanding Applicant's Bankruptcy Filing
- Neither Letter of Credit, Nor Its Proceeds, are Property of the Debtor's Estate and Issuing Bank Pays From Its Own Assets
- Automatic Stay Does Not Preclude Either Issuing Bank's Payment, or Beneficiary's Draw, Under Properly Drafted Letter of Credit
- Bankruptcy Court Injunction of Drawing by Beneficiary or Payment by Issuing Bank Unlikely

Letters Of Credit: Impact of Applicant's Bankruptcy Filing – Preference Issues

- Standby Letter of Credit Issued for Debtor's/Applicant's Account More Than 90 Days Before Its Bankruptcy Filing and Drawn on By Creditor/Beneficiary and Paid Within 90 Days of Bankruptcy, or After Bankruptcy, is Not a Preference
- Issuing Bank's Payment to Beneficiary Under Standby Letter of Credit Issued for Debtor's Account Within 90 Day Preference Period to Secure Payment of Antecedent Debt and Secured by Debtor's Assets May Be Subject to Preference Risk

Guaranty

Parties and Contracts/Obligations



Guaranty

- A Guaranty is an Agreement to Perform a Third Party Obligor's Contractual Obligation
- Requirements
  - Must be in writing
  - Must be signed by guarantor
  - Must be supported by consideration; e.g., based on
    - Ownership of business
    - Active participation in business
- Utility
  - Guarantor's Creditworthiness
  - Guarantor's Financial Statements
- Sample Form – Supp. Tab D at pg. 37

Guaranty

- Guarantor's Undertaking
  - Guaranty of payment – yes
    - Creditor can look to guarantor without exhausting collection efforts against customer
  - Guaranty of collection – no!
    - Creditor must exhaust collection efforts against customer prior to proceeding against guarantor

Guaranty

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

Guaranty – Spousal Guaranty Limits

- Spousal Guarantees – ECOA/Federal Reserve Regulation B Limits
  - General rule: cannot request spousal guaranty
  - Spousal guaranty permitted in following circumstances:
    - Spouse can voluntarily offer guaranty
    - Spouse officer/principal
    - Joint principal-spouse ownership of property
    - Community property state
      - Principal/spouse reside there
      - Reliance on jointly owned property located there
      - Instrument must be necessary to make community property available to satisfy debt

Guaranty – Spousal Guaranty Limits

- United States Supreme Court Recently Addressed Validity of Regulation B's Limits on Spousal Guarantees
  - Division among U.S. Courts of Appeal on validity of Regulation B's limits on spousal guaranty
    - 8th Circuit – No
    - 6th Circuit – Yes
  - The Supreme Court in a 4-4 vote affirmed the ruling of the 8th Circuit Court of Appeals that spousal guarantors are not protected by the ECOA
    - Decision is not nationwide precedent in future cases

Guaranty

- Guarantor Execution
  - 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

Guaranty By Affiliated Entities

- Are Any Creditors Obtaining Guaranty from Parent/Affiliates?
- Bankruptcy Issues
  - Substantive consolidation vs. deconsolidation
  - Enhanced distribution prospects for holders of parent/affiliate guarantees

Guaranty By Affiliated Companies

- Fraudulent Conveyance Risk
  - Downstream Guaranty
    - Parent guaranty subsidiary obligation
  - Cross Stream Guaranty
    - Affiliate guaranty – affiliate obligation
  - Upstream Guaranty
    - Subsidiary guarantee – parent obligation

Guaranty – Unconditional Guaranty of Payment and No Offset 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 <u>Prima</u> <u>Facie</u> 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.

Trade Creditors’ Setoff Rights

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

Trade Creditors’ Setoff Rights

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

Trade Creditors' Setoff Rights

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

Triangular Setoff

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

Triangular Setoff

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

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

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

Triangular Setoff

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

Questions?

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Practice

Lowell's ability to find creative solutions to complex legal issues has led to successful transactions for a wide range of commercial clients. His pragmatic approach to negotiating deals, coupled with an extensive background in finance and economics, gives him a keen understanding of the business issues involved in each transaction.

Lowell's clients include hedge and private equity funds, large operating companies, large trade creditors, investment banks, money center financial institutions, REITs, and commercial finance companies. He advises on transactions ranging from acquisition financing to recapitalization and convertible debt financing, as well as Term B loans, workouts, DIP financings, leveraged loans, and mezzanine loans. He also handles asset-based financing transactions, and structures and closes cash flow transactions.

In addition to his legal work for the firm, Lowell applies his interpersonal and teaching skills as co-chair of the New York Office summer program, and demonstrates his commitment to charitable causes as a member of the Pro Bono Committee.

Principal areas of focus include:

- Real estate finance transactions
- Mortgage warehousing transactions
- Bank workout transactions
- Debtor-in-possession financings
- Trade finance transactions
- Factoring arrangements
- Mortgage repurchase transactions

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 Represents TRANZACT in Sale Transaction** June 9, 2016
- **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

- **"Secured Transactions Chapter in New York Practice Guide: Business and Commercial,"** Lowell A. Citron, Matthew Bender, *LexisNexis,* 2003

Bar Admissions

- 1995, New York

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Practice

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

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

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

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

Publications

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