

**DOING BUSINESS WITH A DEBTOR, BEFORE,  
DURING AND AFTER  
A CHAPTER 11 PROCEEDING**

**BCCA MEDIA CREDIT SEMINAR  
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# WARNING SIGNS OF FUTURE CUSTOMER BANKRUPTCY

- ▶ Increased Reliance on Debt to Fund Operations
- ▶ Failure to Invest in CapEx
- ▶ Continuing Substantial Operating and Net Losses
- ▶ Declining Cash Flow/Declining Availability Under Loan Facility
- ▶ Declining Margins

# WARNING SIGNS OF FUTURE CUSTOMER BANKRUPTCY

- ▶ Request For Increase In Credit Line
- ▶ Change in Payment Pattern
- ▶ Increased Frequency of Post-Dated Checks / Check Hold
- ▶ Increased Frequency of Bounced Checks
- ▶ Loss of Trade Credit
- ▶ Distressed Company Seeking to Become New Customer After Being Denied Credit by Competitor

# WARNING SIGNS OF FUTURE CUSTOMER BANKRUPTCY

- ▶ Upcoming Principal or Interest Payment on Bond Debt
- ▶ Upcoming Maturity of Bond Debt
- ▶ Risk of Upcoming Bond Default
- ▶ Covenant Breach/Default on Debtor's Loan Facility
- ▶ Debtor's Entry Into Forbearance Agreement
- ▶ Imminent Expiration of Loan Facility

# WARNING SIGNS OF FUTURE CUSTOMER BANKRUPTCY

- ▶ Downgraded Credit Rating To Unacceptably Low Level
- ▶ Loss of Credit Insurance
- ▶ Loss of Market For Puts
- ▶ Change of Leadership (CFO or CEO)
- ▶ Resignation of Members of Board of Directors
- ▶ Appointment of New Board Members with Insolvency Background

# WARNING SIGNS OF FUTURE CUSTOMER BANKRUPTCY

- ▶ Retention of Chief Restructuring Officer
- ▶ Retention of Crisis Manager
- ▶ Formation of ad hoc Bondholder Committee
- ▶ Retention of Insolvency Professionals
- ▶ Reports of Negotiations With Prospective Chapter 11 Lender
- ▶ Threats of Imminent Customer Bankruptcy

# WARNING SIGNS: INFORMATION SOURCES

- ▶ Utilizing Professional Contacts
  - Other vendors dealing with the customer
  - Salespersons in industry
  - Trade associations & credit groups
  - Legal counsel with industry ties/insight
- ▶ Direct Contact With Customer
  - “Drive by” of facility
  - Unannounced site visits
  - Frequent calls & e-mails
  - Sales meeting on site

# WARNING SIGNS: INFORMATION SOURCES

- ▶ Publicly Available Information
  - Local newspapers/websites
  - SEC filings
  - Stock price quotes
- ▶ Credit Check
- ▶ Ratings Agencies: Standard & Poors, Moody's, Fitch
- ▶ Dun & Bradstreet
- ▶ Uniform Commercial Code, Judgment, Lien and Litigation Searches
- ▶ Industry Gossip



# WARNING SIGNS: INFORMATION SOURCES

- ▶ Distressed Debtor Reports – Pay Services
  - *Bloomberg*
    - [www.bloomberg.com/professional](http://www.bloomberg.com/professional)
  - *Debtwire*
    - [www.debtwire.com](http://www.debtwire.com)
  - *Law360*
    - [www.law360.com](http://www.law360.com)
  - *The Distressed Debt Report*
    - [www.distresseddebt.dealflow.com](http://www.distresseddebt.dealflow.com)

# ADEQUATE ASSURANCE RIGHTS

- ▶ Restatement (Second) of Contracts – §251
  - Applies to Service Contracts
  - Modeled on UCC §2-609 in favor of goods sellers
- ▶ Some States Have Adopted Restatement (Second) §251
- ▶ Other States Have Granted relief based on Restatement (Second) §251

# ADEQUATE ASSURANCE RIGHTS

- ▶ §251 When a Failure To Give Assurance May Be Treated As a Repudiation
  - Where reasonable grounds to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages in total breach the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance
  - The obligee may treat as a repudiation the obligee's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of a particular case.

# ADEQUATE ASSURANCE RIGHTS

- ▶ Reasonable Grounds To Believe That Obligor Will Commit A Breach By Non-Performance
  - Similar to grounds for insecurity under UCC 2-609
- ▶ Examples
  - Customer past due
    - With the seller
    - With other vendors
  - Warning signs previously discussed

# ADEQUATE ASSURANCE RIGHTS

- ▶ What Constitutes Adequate Assurance of Due Performance?
  - Revoke credit terms and switch to cash in advance?
  - Collateral security?
  - Letter of credit?
- ▶ Possible Resolution via Restricted Credit Terms?
  - Bankruptcy Preference Risk

# POST-PETITION TRANSACTIONS WITH A DEBTOR-IN-POSSESSION (DIP)

- ▶ **POST-PETITION SERVICES RENDERED are PRIORITY ADMINISTRATIVE EXPENSES**
  - On an even footing with ALL other priority administrative expenses, including attorneys' fees, accountants' fees, post-petition wages, etc.

# FIRST DAY MOTIONS

- ▶ Important Information for Creditor Contemplating Transactions with the Debtor-in-Possession
  - DIP FINANCING MOTION
    - Lets you know how much cash the debtor will obtain
    - Read the Financing Stipulation for terms of borrowing
    - “Carve Out” for US Trustee, Committee Professionals, Other Professionals
    - What kind of security is given the Lender
    - Read the Budget

# FIRST DAY MOTIONS

- ▶ Important Information for Creditor Contemplating Transactions with the Debtor-in-Possession
  - MOTION TO USE CASH COLLATERAL – money received by the debtor from the sale of its assets
    - Lets you know the bank is unfriendly
      - Bank sometimes objects
    - Debtor needs its cash to buy new product to sell
    - Budget most important to determine what kind of cash DIP will have to buy new products
    - Look for other points similar to Financing Order



# SELLING TO A CHAPTER 11 DEBTOR

## [Can the DIP Pay its Bills?]

- ▶ First Day Motion to Obtain Financing or Use Cash Collateral provides substantial financial information
  - Read declaration/affidavit/affirmation in support of First Day Motions
- ▶ Budget appended to Financing Motion or Motion to Use Cash Collateral tells you what the DIP cash flow is expected to be

# SELLING TO A CHAPTER 11 DEBTOR

## [Can the DIP Pay its Bills?]

- ▶ Monthly Operating Reports give monthly data on an ongoing basis
  - Receipts and Disbursements
  - a/r reconciliation and aging
  - a/p and secured payments report
  - Inventory and Fixed Assets Report
  - Summary of Bank Activity
  - Check Register
  - Detail of Investment Accounts, Petty Cash, Report of Taxes Owed and Due
  - Officer or Owner Compensation
  - Significant Developments

# CRITICAL VENDOR ORDERS

- ▶ Doctrine of Necessity
- ▶ Creditor essential to debtor's business operations
- ▶ Debtor will be forced to pay in advance for essential services

# CRITICAL VENDOR ORDERS

- ▶ Cost of services from different vendor much greater
- ▶ Debtor cannot get services anywhere else
- ▶ Debtor has favorable contract with vendor
- ▶ Vendor threatening not to service debtor at all

# CRITICAL VENDOR ORDERS

- ▶ QUID PRO QUO
- ▶ Creditors receiving critical vendor status must agree to extend post-petition credit
- ▶ other requirements

# SELLING TO A CHAPTER 11 DEBTOR

## Considerations if You are a Critical/Essential Vendor cont'd

### ▶ REQUIREMENTS

- agree to continue to supply goods and services based on "Customary Terms"
- Continue to supply services on an uninterrupted basis
- No credit limit or cap

# OTHER WAYS TO DO BUSINESS WITH THE DEBTOR-IN-POSSESSION EXECUTORY CONTRACTS

## ▶ DEFINITION

- ONE WHERE SOME FUTURE ACT IS TO BE DONE (Black's Law Dictionary)
- ONE IN WHICH A PARTY HAS MATERIAL UNPERFORMED OBLIGATIONS (Wikipedia)
- No definition in the Bankruptcy Code

# WRITTEN EXECUTORY CONTRACTS

- ▶ Requirements Agreement
- ▶ Consignment Agreement
- ▶ Service Agreement (media)



# EXECUTORY CONTRACTS AND THE BANKRUPTCY CODE

- ▶ 11 U.S.C. 365(b)(2) authorizes a debtor to assume any executory contract subject to court approval
  - Defaults must be cured or adequate assurance must be provided
  - Creditor must be compensated for any actual pecuniary damage due to default
  - Adequate assurance of future performance must be given

# EXECUTORY CONTRACTS

## ▶ DEFINITIONS

### ◦ ASSUMPTION

- all prepetition monies paid
- Adequate assurance of future performance

### ◦ REJECTION

- contract is terminated
- No future action
- Creditors' prepetition claim becomes a general unsecured claim

# EXECUTORY CONTRACTS ASSUMPTION OR REJECTION

- ▶ Debtor has absolute right to assume or reject (subject to court approval)
- ▶ No strict deadline
- ▶ Debtor must decide before Plan Confirmation

# PERIOD BETWEEN FILING DATE AND ASSUMPTION/REJECTION OF EXECUTORY CONTRACTS

- ▶ Bankruptcy Code is silent on rights and obligations of parties during period between Chapter 11 filing and assumption/rejection
- ▶ Prior to assumption/rejection, contract is enforceable by, but not against, Debtor
  - Non-debtor party must continue to perform prior to assumption/rejection
  - Debtor could reject and stop performing
  - Ipso Facto Clause terminating or modifying contract upon bankruptcy filing is unenforceable

# PERIOD BETWEEN FILING DATE AND ASSUMPTION/REJECTION OF EXECUTORY CONTRACTS

- ▶ Is non-debtor obligated to continue extending credit post-petition if required by contract?
- ▶ Helpful contractual provisions
  - Terms at creditor's discretion
  - Automatic switch to cash in advance terms upon default
- ▶ Common law right to demand adequate assurance of due performance upon reasonable grounds to believe Debtor will commit a breach of contract

# PERIOD BETWEEN FILING DATE AND ASSUMPTION/REJECTION OF EXECUTORY CONTRACTS

- ▶ Risk of Switching From Credit to Cash in Advance
- ▶ Exposure To:
  - Breach of contract claim?
  - Claim of Violation of automatic stay?
  - Court's Issuance of OSC To Hold Creditor in Contempt

# THE RIGHT WAY TO SWITCH TERMS

- ▶ Having the Right Contractual Provision
- ▶ Consensual Renegotiation of Terms
- ▶ Creditor Can File a Motion Seeking:
  - Expedited decision by Debtor to assume or reject contract
  - 11 U.S.C. 365(d) provides:
    - On request of any party to contract
    - Court may order the trustee/debtor to determine within specified period of time to assume or reject such contract

# THE RIGHT WAY TO SWITCH TERMS (Cont'd)

- ▶ As part of relief for expedited assumption/rejection, a creditor can also seek adequate assurance/adequate protection to obtain any of the following:
  - Critical vendor status (subject to court approval)
  - Switch to cash in advance terms
  - Cash deposit
  - Letter of credit
- ▶ Examples of The Right Way: Reader's Digest, Visteon, Linens n' Things



# OTHER REASONS FOR CREDITOR TO FORCE THE ISSUE

- ▶ Creditor doesn't want to be stuck with contract
- ▶ Creditor wants to work with another entity
- ▶ Contract is really unfavorable
- ▶ Creditor wants/needs to get paid its prepetition debt

# COURT GUIDELINES

- ▶ Importance of Contract to Debtor's business and reorganization
- ▶ Debtor's failure or ability to satisfy post-petition obligations
- ▶ Damage the non-debtor will suffer
- ▶ Exclusivity intact or terminated
- ▶ Has debtor had sufficient time to appraise its financial situation

# ADVANTAGES OF “FORCING THE ISSUE”

- ▶ Debtor may agree to release creditor from contract
- ▶ Creditor may be able to negotiate more favorable terms
- ▶ Debtor may agree to deadline
- ▶ Cases of Note:
  - Quebecor
  - Lyondell
  - Cooper

# UNILATERAL ACTION DANGEROUS

- ▶ Failure to fulfill terms of any executory contract can find the creditor in contempt of automatic stay
- ▶ Long Term Contracts = Executory Contracts
- ▶ Court may issue OSC to hold creditor in contempt
  - Metaldyne
  - Visteon

# SELLING TO A CHAPTER 11 DEBTOR

## Considerations if You are MERELY a Pre-Petition Unsecured Creditor

- ▶ Very Little Recourse
- ▶ Decide what you can afford to lose
- ▶ Risk of administrative insolvency
  - Administrative claims are paid only after secured creditors are paid from their collateral or on account of any superpriority administrative claim
  - Estate is administratively insolvent if insufficient cash to fully pay administrative claims

# “OUT OF BANKRUPTCY?”

- ▶ When a Plan is Approved does that mean a company is “out of bankruptcy?”
  - No

# PLAN APPROVAL PROCESS

## ▶ Exclusivity

- Debtor has 120 days, exclusively, from Order of Relief to file a Plan
- Small Business Debtors have an exclusive period of 180 days

## ▶ Other Deadlines

- Plan is to be accepted within 180 days from Order of Relief
- Small Businesses have 300 days maximum to file a Plan and Disclosure Statement

# PLAN APPROVAL PROCESS

- ▶ Disclosure Statement
  - Generally filed with or shortly after Plan
  - Debtor has 120 days, exclusively, from Order of Relief to file a Plan
  - Small Business Debtors have an exclusive period of 180 days
- ▶ Other Deadlines
  - Plan is to be accepted within 180 days from Order of Relief
  - Small Businesses have 300 days maximum to file a Plan and Disclosure Statement



# PLAN APPROVAL PROCESS

- ▶ CONTENTS OF DISCLOSURE STATEMENT
  - Sufficient information to Enable a Creditor to Make an Informed Decision
  - Liquidation Analysis
  - Pro Forma Balance Sheet post-confirmation
  - How much and when each class of creditors will be paid
    - General Unsecured Creditors generally in one class
    - Payments may be one lump sum or periodic payments
    - Payments range from 5¢ to 100¢ with interest

# PLAN APPROVAL PROCESS

- ▶ ACCEPTANCE OF PLAN
  - 2/3rds in dollar amount
  - 1/2 in number
  - Only voting claims count

# PLAN CONFIRMATION

- ▶ 16 Provisions in 1129 to be met, including:
  - Each class has accepted the Plan – OR –
  - A non-accepting class will receive or retain not less than liquidating value – OR –
  - Class is **not** impaired by the Plan
- ▶ Plan not likely to be followed by Liquidation
- ▶ No lower class gets paid unless each higher class is paid in full
  - Equity Interests do not get paid NOR retain their interests unless they have contributed (Absolute Priority Rule)

# FOLLOWING CONFIRMATION: NOW WHAT?

- ▶ What is the Definition of “coming out of bankruptcy”? – OR –
- ▶ What happens following Confirmation?
  - Once Plan is Confirmed, the path is open for a debtor to “come out of bankruptcy”
  - Effective Date will be the Date in the Plan when payments start to get made
  - Plan is still subject to Modification until there has been Substantial Consummation (i.e. money has been paid out)

# FOLLOWING CONFIRMATION (Cont'd)

- ▶ “Coming out of bankruptcy”?
  - Once Plan is substantively consummated – then Debtor is considered to be “out of bankruptcy”
    - Request is made for a Final Decree
    - Final Decree is Signed
    - Bankruptcy Case is Closed

# TERMS OF ART

- ▶ In terms of extending credit, what does it mean when:
  - A Bankruptcy Plan is Approved?
  - A Bankrupt is Discharged?
  - A Bankruptcy is Dismissed?
  - A Bankruptcy is Terminated

# APPROVED?

- ▶ In terms of extending credit, what does it mean when A Bankruptcy Plan is Approved?
  - Two “Approvals” are required
    - The Disclosure Statement must be approved before it can be sent to creditors for voting
    - The Plan is **Confirmed** – i.e. the Plan is Approved

# DISCHARGED?

- ▶ In terms of extending credit, what does it mean when A Bankrupt is Discharged?
  - 727 grants a discharge to an individual, with various exceptions to discharge
  - 1141 provides that an Confirmation of a Plan discharges the debtor from any debt arising before the date of such confirmation, with various exceptions
  - 1228 grants a discharge to a family farmer or fisherman
  - 1328 grants a discharge to an individual with regular income AFTER completion by the debtor of all payments under the plan



# NON-DISCHARGEABLE DEBTS

- ▶ A credit grantor may move to bar a discharge of a particular debt under:
  - 523 – money, property, services...obtained by false pretenses, false representation, actual fraud, materially false written financial statement
  - OR
  - 727 allows the denial or revocation of a discharge based on:
    - Fraudulently transferred or concealed property within 1 year prior to bankruptcy
    - Concealment, destruction, mutilation, falsification or failure to keep or preserve financial information
    - Other types of fraud

# DISMISSED?

- ▶ In terms of extending credit, what does it mean when A Bankruptcy is Dismissed?
  - If a Bankruptcy is Dismissed, it is as though the bankruptcy never occurred
    - You can pursue the original debtor by any legal means to collect your debt

# TERMINATED?

- ▶ In terms of extending credit, what does it mean when A Bankruptcy is Terminated?
  - The use of the word “terminated” is not found in the Bankruptcy Code. There are several possible interpretations:
    - The Bankruptcy has been dismissed
    - A Chapter 11 is confirmed, a Final Decree is Issued and the Case is Closed
    - A Chapter 7 is fully liquidated, all assets are distributed to creditors and the Case is Closed.

# SPEAKER BIO

## WANDA BORGES

WANDA BORGES, the principal member of Borges & Associates, LLC., has been specializing in commercial insolvency practice and commercial litigation representing corporate clients throughout the United States for an excess of thirty years.

She is admitted to practice before the courts of the State of New York and the United States District Court for the Southern, Eastern, Northern and Western Districts of New York, the United States District Court for the District of Connecticut, the Second Circuit Court of Appeals and the Supreme Court of the United States. She is a member of the American Bar Association, American Bankruptcy Institute, The Hispanic National Bar Association, The International Association of Commercial Collectors, International Women's Insolvency and Restructuring Confederation, and the Turnaround Management Association. As a member of the Commercial Law League of America, she is a Past President of the League, is a Past Chair of its Bankruptcy Section, and served for six years on the Executive Council of the Eastern Region of the CLLA.

She is a regular lecturer for the National Association of Credit Management (NACM) and its various affiliates. She has prepared and continues to update courses on "Advanced Issues in Bankruptcy", "Basics in Bankruptcy", "Current Cases in Bankruptcy", "Creditor's Committees", "Credit and Collection Issues", Sarbanes-Oxley Act of 2002, "Litigation Issues" and "Antitrust Issues" which have been presented at past NACM Annual Credit Congresses and are scheduled for future Congresses. Even prior to the passage of the "Red Flags Rule", Ms. Borges worked with the NACM and the FTC to determine the applicability of the Rule to business creditors. Ms. Borges has prepared and presents seminars on the Red Flags compliance issues for the NACM, its various affiliates, corporations, collection agencies and various other organizations. Ms. Borges is a faculty member for the NACM's Graduate School of Credit and Financial Management at Dartmouth College. Ms. Borges has been a faculty member for the National Institute on Credit Management, a program jointly sponsored by the Commercial Law League of America and the National Association of Credit Management.

She has been a regular lecturer for the American Management Association on the Uniform Commercial Code and Fundamentals of Business Law for the Non-Lawyer, and for both the American Management Association, the Media Financial Management Association (formerly the Broadcast Cable Financial Management Association) and the Broadcast Cable Credit Association on Creditor's Rights in Commercial Litigation and Bankruptcy Matters. Additionally, she has presented seminars and webinars for the National Conference of Bankruptcy Judges, the American Bankruptcy Institute, The Commercial Law League of America, The International Association of Commercial Collectors, various local and national Bar Associations, the American Automotive Leasing Association, Thomson West Publishing Company, the National Chemical Credit Association, the Publishers Credit Association, the Health Industry Manufacturers Association, the Beauty and Barber Manufacturers Credit Association, the New Hampshire Association of Broadcasters, the Credit Association for Satellite History, and the New York State Food Service Distributors Association. She is a frequent lecturer for Riemer Reporting Service.

She has served as the Managing Editor and still is one of the contributing authors of the *Manual of Credit and Collection Laws* published by the National Association of Credit Management and is a contributing author to its *Principles of Business Credit*. She is a member of NACM's Editorial Advisory Committee. She has served as a Contributing Editor for the Commercial Law League of America's Bulletin and Journal and has contributed to the Bankruptcy Section Newsletter. Her treatise *Hidden Liens: Who is Entitled to What?* was published in the Fall, 1998 Edition of the Commercial Law Journal. She has authored *Antitrust, Restraint of Trade and Unfair Competition: Myth Versus Reality*, published by the NACM. Ms. Borges is the lead author and Editor-in-Chief of *Enforcing Judgments and Collecting Debts in New York* published by Thomson West Publishing Company and updated annually. She routinely publishes articles for the National Association of Credit Management "Business Credit" magazine and has published articles for its "Fraud Prevention News". Upon the passage of the BAPCPA in 2005, Ms. Borges prepared and presents educational programs on this new legislation and co-authored *The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 – An Overhaul of U.S. Bankruptcy Law*, published by the NACM.

# SPEAKER BIO

She has published articles for the Broadcast Cable Credit Association "Creditopic\$" and the "The Financial Manager" on Commercial Creditors' Rights in Bankruptcy, Bankruptcy issues generally, the FTC's Red Flags Rule, the ECOA and Regulation B, Electronic Invoicing, "Dot Com" Businesses, and on Advertiser/Agency Liability; and has prepared the "white paper" on the discontinuance of notarization of broadcast invoices. She is a co-author of the National Association of Broadcasters' book *Out of the Red and into the Black*, as well as the Broadcast Cable Credit Association's *Credit & Collection Handbook*. Ms. Borges has appeared as a guest on the Fox News Channel program, "Fox on Consumers", speaking on consumer bankruptcy exemptions. In February, 2010, Ms. Borges prepared and presented a program entitled "Avoiding Bankruptcy Pitfalls: Creditors' Rights and Professional Obligations in Bankruptcy Proceedings" for the Georgia Bar Association and the Institute of Continuing Legal Education in Georgia" which was televised live and telecasted to satellite locations throughout the State of Georgia.

She has conducted "in-house" seminars on credit, collection, secured transactions and insolvency for corporate clients such as Agrium, Inc., Bristol-Myers Squibb, Burlington Industries, Inc., Cosmair, Inc., Doric Enterprises, Ferguson Enterprises, Inc., Mars Incorporated, McKesson Corporation, Mobil Chemical Company, Multi-Arc Corp., Pfizer Inc., R.J. Reynolds Tobacco Company, Sandvik, Inc., Sharp Electronics Corporation, Simon & Schuster Corp., SONY Corporation, Stanley Works and SunTrust Bank.

She is a past Chair of the Board of Trustees of Mercy College and served as a member of that board for nine years. She has served on the board of Regents College, and has taught Business Law at Seton College in Westchester County, New York. She is a past Chair of the Broadcast Cable Financial Management Association.

Ms. Borges actively participates in community events. She is the Director of the Youth Music Ministry and Leader of Song at her parish, Our Lady Star of the Sea. She remains a member of the Fairfield County Chorale of which she is a past-president and past-director.

She received the "Human Valor" Award by Noticias del Mundo, a New York based spanish-language newspaper in 1985, the Mercy College Alumni Association's "Professional Achievement" Award in 1991, honorary membership in Delta Mu Delta - The National Honor Society in Business Administration - in May, 1995 and in October, 1996, was awarded the Mercy College Trustee's Medal for outstanding dedication to her profession and alma mater. She is listed in Who's Who of American Women. In September, 2000 she was named one of the "50 Outstanding Alumni" of Mercy College. In February, 2001 she received the "Career Achievement Award" from the Broadcast Cable Credit Association. In May, 2004, she received the "Strength in Numbers Recognition Certificate" from the National Association of Credit Management. In December 2006, she was named one of "2006 Top25 Most Influential Collection Professionals" by Collection Advisor Magazine. Ms. Borges was recently inducted into Mercy College's Alumni Hall of Fame celebrating its 60th year in existence. In November, 2010, Ms. Borges received the "Robert E. Caine Award for Leadership" from the Commercial Law League of America. In May, 2011 Ms. Borges was selected as one of 2011 New York Super Lawyers by Thomson Reuters.

# SPEAKER BIO



## **Bruce S. Nathan**

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## **Practice**

Bruce S. Nathan, Member in the firm's Bankruptcy, Financial Reorganization & Creditors' Rights Group, has approximately 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. Mr. Nathan 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 creditors' committee in the Borders Group Inc. Chapter 11 case. Mr. Nathan also negotiates and prepares letters of credit, guarantees, security, consignment, bailment, tolling, and other agreements for the credit departments of institutional clients.

Mr. Nathan 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 and Editorial Advisory Board, 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*.

In 2011, Mr. Nathan received the Top Hat Award, a prestigious annual award honoring extraordinary professionals in the credit industry.

## **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

# SPEAKER BIO

- American Bankruptcy Institute
  - Member, Board of Directors
  - Contributing Editor, *American Bankruptcy Institute Journal* - "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
- 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
  - Member, Editorial Advisory Board
  - 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
- Lecturer, Executive Enterprises Inc. the Bank Lending Institute and the Banking Law Institute on Commercial Loan Workouts & UCC Issues
- Contributor
  - *Credit Today*
  - *National Credit News*

## Articles/Interviews Featuring Bruce S. Nathan

- **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



# SPEAKER BIO

## Publications

- **"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?,"** *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
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- **"Compelling Postpetition Trade Credit: Navigating Uncharted Waters,"** Bruce S. Nathan, *American Bankruptcy Institute Journal*, October 2009



# SPEAKER BIO

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- **"Enforceability of Triangular Setoff Rights In Safe Harbor Contracts - Still An Open Question? Part 1,"** Bruce S. Nathan, S. Jason Teele, Matthew A. Magidson, *Derivatives Week*, June 22, 2009
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# SPEAKER BIO

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- **"Manual of Credit And Commercial Laws,"** Bruce S. Nathan, *National Association of Credit Management (97th Edition)*, 2006
- **"Reclamation Manual/Sellers' Rights of Reclamation, Stoppage of Delivery and New Administrative Claim,"** Bruce S. Nathan, *American Bankruptcy Institute*, 2006
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# SPEAKER BIO

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- **"Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Significant Business Bankruptcy Changes in Store for Trade Creditors,"** Bruce S. Nathan, Wanda Borges, Esq., *Business Credit*, May 2005
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- **"A New Defense Against Preference Claims?,"** Bruce S. Nathan, *Credit Today*, October 2004
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- **Are Reclamation Claims Heading for Oblivion Where the Debtor Has a Secured Inventory Lender?,"** Bruce S. Nathan, *Business Credit*, September 2004
- **"Critical Vendor Payments Denied by Kmart Ruling - Part 2,"** Bruce S. Nathan, *National Credit News*, July-August 2004
- **"Critical Vendor Payments Denied by Kmart Ruling - Part 1,"** Bruce S. Nathan, *National Credit News*, June 2004

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- "Can Sanctions Be Imposed For Improperly Prosecuted Preference Actions?," Bruce S. Nathan, *Business Credit*, May 2004
- "Section 502(d) Preclusion of Preference Claims: A New Defense or a Dry Hole?," Bruce S. Nathan, *American Bankruptcy Institute Journal*, May 2004
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- "Trade Creditors Beware: Providing Post-Petition Goods and Services to a Chapter 11 Debtor Under a Prepetition Contract Without Protection Can Be Toxic to Collectibility," Bruce S. Nathan, *Business Credit*, September 2003
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## Bar Admissions

- 1981, New York