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IS YOUR SHIP STRANDED AT SEA: DEMYSTIFYING CHAPTER 15 OF THE BANKRUPTCY CODE AND RECENT CROSS-BORDER INSOLVENCY DEVELOPMENTS

PRESENTATION FOR:
FCIB WEBINAR

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FCIB – The Finance, Credit & International Business Association

Presented by:

Bruce S. Nathan, Esq.
Partner
Telephone: (212) 204-8686
Facsimile: (973) 422-6851
bnathan@lowenstein.com
www.lowenstein.com

Philip J. Gross, Esq.
Counsel
Telephone: (973) 597-6246
Facsimile: (973) 597-6247
pgross@lowenstein.com
www.lowenstein.com

Lowenstein Sandler

Program Purpose

- Financially Distressed Multinational/Foreign Companies are Increasingly Utilizing Chapter 15, a Less Prominent Section of the Bankruptcy Code
- Demystifying Chapter 15's Complexities
- Discussing How Chapter 15 Works and Goals of a Chapter 15 filings
- Discussing Salient Points for Creditors to Consider When a Foreign Debtor Files a Chapter 15 Petition
- Highlighting Recent Cross-Border Insolvency Issues and Decisions

CHAPTER 15 BASED ON UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

- Enacted in 2005 as a Part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005
- Part of Multinational Effort to Foster the Orderly Administration of Cross-Border Bankruptcy Cases
- Chapter 15 Allows for Cooperation Among Courts of Different Jurisdictions to Facilitate a Coordinated Approach to Administer the Assets of a Debtor with Operations/Assets in Multiple Countries
- Over 41 Countries have Adopted Legislation Based on the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on Cross-Border Insolvency

CHAPTER 15 BASED ON UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY (Cont.)

- In Addition to the United States (Through the Adoption of Chapter 15 in 2005), Some of the Other Countries that Have Adopted Legislation Based on the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on Cross-Border Insolvency include: **Australia; Canada; Greece; Japan; Mexico; New Zealand; Philippines; Poland; Republic of Korea; South Africa; United Kingdom**
- Chapter 15, Which Adopted and Implemented Virtually All of the Substantive Provisions of the UNCITRAL Model Law, Became Effective October 17, 2005

Chapter 15's Main Objectives

- U.S. Court of Appeals - Third Circuit (important U.S. Appellate Court) - *In re ABC Learning Centres Ltd.* (2013) Noted:
  - With the enactment of Chapter 15, Congress encouraged communication and cooperation with foreign courts, and authorized U.S. courts to communicate directly with foreign courts.
  - Chapter 15 reflects a universalism approach to transnational insolvency that is meant to direct creditors and assets to the foreign main insolvency proceeding and ensure the orderly and fair distribution of assets.

Chapter 15's Main Objectives (Cont.)

- Promotes Greater Legal Certainty for Trade and Investment
- Encourages Efficient Administration of Cross Border Insolvencies that Protect the Interests of Stakeholders
- Protects and Maximizes the Value of Foreign Debtors' Assets
- Protects Investments, Preserves Employment by, and Facilitates Reorganization of, Troubled Foreign Debtors

Basic/Threshold Requirements For A Chapter 15 Case

- Pending Foreign Insolvency Proceeding
- Duly Authorized Representative of that Foreign Proceeding Seeking Recognition
- Foreign representative is Often a Critical Player in the Foreign Insolvency:
  - Foreign Debtor
  - Receiver (Canada)
  - Liquidator
  - Monitor (Canada)
- Foreign Representative Must Obtain "**Recognition**" of the Foreign Proceeding as a Foreign Main Proceeding or Foreign Nonmain Proceeding Before Obtaining the Rights and Benefits of Chapter 15

Basic/Threshold Requirements For A Chapter 15 Case (Cont.)

- Rights Upon Recognition Include:
  - Protecting foreign debtor's U.S. assets from creditor action
  - Obtaining access to and relief from the United States courts on most matters
  - Recognition hearing cannot be held before creditors given at least 21 days notice of the relief being sought (but typically longer period

Must a Foreign Debtor Have Assets Located in the United States to Qualify for Chapter 15 Protection? Maybe…

- Section 109(a) of the Bankruptcy Code Requires All "Debtors" that Seek Protection to Have a Place of Business or Property in the U.S.
- Split has Developed in the Case Law Whether a Foreign Debtor Must Have a Place of Business or Property in the U.S. to Qualify for Chapter 15 Relief.

Must a Foreign Debtor Have Assets Located in the United States to Qualify for Chapter 15 Protection? Maybe… (Cont.)

- U.S. Court of Appeals - Second Circuit (Another Prominent Appellate Court) - *In re Barnet* (2013); New York Bankruptcy Court – Southern District - *In re Octaviar Admin. Pty Ltd* (2014) and *In re Berau Capital Resources Pte Ltd* (2015):
  - **Requires all foreign debtors to maintain place of business or property in the U.S.**
    - Note that: **a retainer sent to a U.S. law firm, or even a contract** between a foreign debtor and a third party governed by New York law, **would qualify as having property in the U.S.**

Must a Foreign Debtor Have Assets Located in the United States to Qualify for Chapter 15 Protection? Maybe Not… (Cont.)

- Delaware Bankruptcy Court - *In re Bemarmara Consulting A.S.* (2013):
  - **No need for a U.S. office or any U.S. assets to qualify for Chapter 15 recognition**
  - rather, just need Foreign Representative seeking recognition in aid of the foreign proceeding and satisfying the other Chapter 15 eligibility requirements

Provisional/Interim Relief – Help for Foreign Debtor During Gap Period

- Chapter 15 Case Commenced by Filing Petition in U.S. Bankruptcy Court
- Given Delay Between Filing and Final "Recognition" Hearing, Foreign Representatives Typically Request (and Courts Typically Grant) Interim or Provisional Relief

Provisional/Interim Relief – Help for Foreign Debtor During Gap Period (Cont.)

- Provisional Relief Applies During the "Gap Period", and May Provide for:
  - a stay/injunction of:
    - creditor collection actions/litigations in the U.S. against foreign debtor; or
    - any party turning over assets of the foreign debtor to protect foreign debtor's U.S. assets
  - protection from termination of important leases/executory contracts
  - enforce DIP financing approved in foreign proceeding
    - In *In re Catalyst Paper Corp.* (2012), Court enforced CCAA Canadian Proceeding, including DIP financing order entered in Canada)
  - **any other appropriate relief**

Provisional/Interim Relief (Cont.)

- Provisional Relief is Routinely Granted
- However, Provisional/Interim Relief Not Granted Without the Debtor Satisfying the Standards for Preliminary Injunction:
  - Reasonable probability of success on the merits
  - Irreparable injury by denial of the relief
  - Whether granting the interim relief will result in even greater harm to the non-moving party
  - Whether the interim relief will be in the public interest

Provisional/Interim Relief (Cont.)

- All Provisional and Final Relief Must "Sufficiently Protect" Creditor Interests. ***See* 11 U.S.C. 1522(a)**
- Also, Bankruptcy Court Cannot Grant Relief "Manifestly Contrary" to U.S. Public Policy
- **WARNING:** Creditors Must be Cognizant of Relief Sought by Debtor that Could (Intentionally or Intentionally) Impinge on Their Rights – Particularly Given the Broad Ability of a Court to Grant "Any Appropriate Relief" Sought by the Debtor

Provisional/Interim Relief (Cont.) - *Hanjin Shipping*

- *In re Hanjin Shipping Co., Ltd.* (2016) - Large International Shipping Company Commenced Rehabilitation Proceeding in Korea
- Commenced Chapter 15 Case in the Bankruptcy Court for the District of New Jersey to Recognize Korean Proceeding
- Chaotic first day Chapter 15 Hearing
  - Concern from cargo owners, port operators, and carriers that relief sought by debtor did not "sufficiently protect" interests of parties seeking to obtain release of cargo containers
  - Hanjin proposed provisional relief that could be read to prevent the transfer of any Hanjin assets, including Hanjin cargo containers
    - This was a potential disaster for cargo owners with goods inside containers that Hanjin was to deliver

Provisional/Interim Relief (Cont.) - *Hanjin Shipping* (Cont.)

- Following Significant Objections From Creditors, the U.S. Bankruptcy Court Directed Parties to Negotiate Complex Protocol Approved as Part of Interim/Provisional Recognition to Allow for Goods to Keep Flowing
- The Court Also Issued a Decision Which Allowed Ships to Come in to the U.S. Under Protection of the Stay, Which Kept Goods Flowing

Provisional/Interim Relief (Cont.) - *Qimonda*

- U.S. Court of Appeals - Fourth Circuit - *Jaffe v. Samsung Electronics Co. Ltd. (In re Qimonda)* (2013)
  - Important decision recognizing protection of patent licensee rights (even though foreign German proceeding did not protect such rights) and providing section 365(n) protections to Chapter 15 creditors
  - Lesson for all Creditors that are intellectual property and other contract counterparties with foreign company

Recognition As Foreign Main Proceeding

- Foreign Proceeding Pending in the Country Where the Debtor has the *Center of its Main Interests*
  - "*Center of main interests*" (COMI) not defined
  - Presumption that country of debtor's registered office is the center of main interests
    - However, that alone may not be dispositive
  - Courts consider various factors, including:
    - location of headquarters
    - location of management
    - location of primary assets
    - location of majority of a debtor's creditors (or majority of those that may be impacted by proceeding)
    - Jurisdiction whose law would apply to most disputes

Recognition As Foreign Main Proceeding (Cont.)

- New York Bankruptcy Court – Southern District - *In re Suntech Power Holdings Co., Ltd* (2014)
  - Bankruptcy Court found that the provisional liquidation going on in Cayman Islands shifted management and oversight of Suntech to the joint provisional liquidator, and thus sufficiently shifted COMI to the Cayman Islands

Recognition As Foreign NonMain Proceeding

- Foreign Proceeding Pending in the Country Where the Debtor has an "*Establishment*"
  - "Establishment" is any place of operations where the Debtor carries out non-transitory economic activity
  - presence of assets in a jurisdiction, without more, is insufficient to create an establishment

Final Recognition As Foreign Main Proceeding Versus Non-Main Proceeding

- After Proper Notice to Creditors (at Least 21 Days, but Often Longer) and Subject to Resolving Objections, **Court will Grant Final Recognition**
- In Foreign Main Proceeding:
  - Petitioning Foreign Representative is automatically given many of the powers of a Chapter 11 debtor In possession or trustee
  - Automatic stay kicks in
  - Secured creditor's adequate protection rights kick in
  - Foreign Representative may operate debtor's business and exercise rights such as selling assets ("363" Sales)
  - Section 549 re: improper post-petition transfers kicks in
  - Section 552 cutting off floating lien rights re debtor's post-petition U.S. property kicks in
- Above Relief Not Automatic in Foreign Non-Main Proceeding, but Can be Requested

Final Recognition – Optional Relief

- Court Could Approve the Following Relief Sought by the Foreign Representative (Subject to **Sufficient Protection** for Creditors):
  - Stay of lawsuits/collection actions or turning over property of debtor
  - Examination of witnesses
  - Entrusting to Foreign Representative administration, realization and/or distribution of debtor's U.S. assets
  - Granting any additional relief available to a trustee
  - **Note: Foreign Representative cannot commence U.S. avoidance actions for preferences/fraudulent transfers (though several cases allow avoidance actions under insolvency law of foreign jurisdictions – *Condor*, *Fairfield Sentry*)**

Final Recognition – Optional and Other Relief

- Additional Optional Relief:
  - Sale of assets, subject to section 363 of the Bankruptcy Code
  - Assignment of leases (section 365 of the Bankruptcy Code does not apply by default in chapter 15 – important in cases of leases or intellectual property licensed from foreign debtors)
  - Financing/use of cash collateral
- Other Relief:
  - Foreign Representative could sue or be sued in a U.S. court
  - Foreign Representative could intervene in lawsuits

Balance/Tension – Foreign Law

- Goal of Chapter 15 is Comity/Deference to Law Where the Foreign Case is Pending

  vs.

- Obligation of U.S. Courts to Sufficiently Protect Creditors' Interests
- Where Relief Seriously/Unjustifiably Injures Creditors, U.S. Court Must Deny Such Relief
- **Creditors/Parties in Interest Must be Vigilant in Reviewing all Relief Sought by the Debtor in Chapter 15 Case, as Such Relief Could Negatively Impact Creditor Rights**

How Does A Trade Creditor Become Aware Of A Chapter 15 Filing?

- The Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") Provide Guidance on How Creditors Receive Notice of a Chapter 15 Filing
- Under the Bankruptcy Rules, at Least 21 Days Notice of the Chapter 15 Filing Must be Provided to:
  - All entities against whom provisional injunctive relief is sought
  - All persons that are parties to any U.S. litigation with the Chapter 15 debtor
  - Such other parties as the court may direct

How Does A Trade Creditor Become Aware Of A Chapter 15 Filing?

- Chapter 15 Debtors Frequently Seek to Establish Court-Approved Notice Procedures Prior to Entry of Final Recognition Order
- *In re Hanjin Shipping Co., Ltd.* (2016)
  - Established procedures that required notice of the Chapter 15 filing and a proposed recognition hearing date by domestic or international U.S. mail to:
    - All known creditors and other parties against whom relief is sought, whether inside or outside the U.S.
    - List of creditors was filed in Korean proceeding, and posted on Hanjin website

Where Are Proofs Of Claim Filed?

- Proofs of Claim Against Chapter 15 Debtors are Different From Those Seen in Chapter 11 and 7 Cases
- Claims Usually Must be Filed in the Foreign Proceeding and NOT in the U.S. Chapter 15 Bankruptcy Proceeding
  - Need to follow claim filing requirements in foreign proceeding, unless a different process is ordered by U.S. Bankruptcy Court
  - Creditors may need to retain foreign counsel to advise on foreign claim filing requirements (particularly as claims may need to be filed in foreign language)

Chapter 15's Practical Uses In Aid Of Foreign Proceeding

- Protect Foreign Debtor's U.S. Assets
- Approve Claim Filing Procedures
- Bind Creditors to Terms of a Foreign Restructuring/Liquidation Plan
- Obtain Releases for Non-Debtor Third Parties
- Facilitate Sales of U.S. Assets and/or Lease/Contract Assignments
- Obtain Case Financing (DIP Financing/Cash Collateral)
- Discovery of Third Parties by Debtor
- Grant Other Necessary Orders, Protocols, or Procedures

Preventing Creditor Attack On Foreign Debtor's Assets - *Hanjin Shipping* (2016)

- Court-Appointed Foreign Representative Commenced Chapter 15 Case to:
  - stay ship/vessel arrests which began following the filing of the rehabilitation proceeding in the Republic of Korea; and
  - allow the Debtor to bring in goods from Asia into the U.S. and insulate goods from creditor attack

Preventing Creditor Attack On Foreign Debtor's Assets - *Hanjin Shipping (cont.)*

- During the "Gap Period," the Bankruptcy Court Approved Several Orders for Provisional Injunctive Relief and Stayed Attempted Creditor Collection Efforts
- Bankruptcy Court Wrote Extensive Opinion on Maritime Lien Issues (Subsequently Affirmed by the District Court) Which Allowed Goods/Commerce to Continue to Flow
- Court Subsequently Recognized the Korean Proceeding as a Foreign Main Proceeding
  - automatic stay under section 362 of the Bankruptcy Code remained in place during the pendency of the Chapter 15 case

Filing Proofs Of Claim - *In Re Quebecor World Inc.*

- Commenced in the Bankruptcy Court for the Southern District of New York
  - ancillary to Canadian CCAA (Chapter 11-like) proceeding
- Bankruptcy Court Recognized the Canadian Proceeding as a Foreign Main Proceeding and Gave Full Force and Effect to the Claims Procedure Order Approved by Canadian Court
- Claims Procedure Order Required Filing of Proofs of Claim in Canada – NOT IN USA

Filing Proofs Of Claim - *Hanjin Shipping*

- Bankruptcy Court Required Both Pre-Petition General Unsecured Claims and Post-Petition "Common Benefit Claims" (Which Arise Under Korean Law) to be Filed in Korea, NOT IN U.S.
  - Creditors tried to keep the Debtor's assets in the U.S. to allow for payment of post-petition claims akin to Chapter 11 administrative expense claims
  - Bankruptcy Court ultimately determined that Korean Court should administer Hanjin's assets and claims and authorized Hanjin's U.S. assets to be transferred to Korea

Binding U.S. Creditors To A Restructuring Plan - *Rede Energia*

- *Rede Energia S.A.* (2014) Commenced Chapter 15 Case in the Bankruptcy Court for the Southern District of New York
  - Ancillary to Brazilian bankruptcy/reorganization proceeding
- Chapter 15 Case was Filed to Bind Unsecured Noteholders to the Terms of a Reorganization Plan Confirmed Under Brazilian law

Binding U.S. Creditors To A Restructuring Plan - *Rede Energia* (Cont.)

- Ad Hoc Group of Noteholders Objected, Arguing that Plan Improperly Substantively Consolidated Debtor Entities and Treated Similarly Situated Unsecured Creditors Differently
- Bankruptcy Court Overruled Objections and Granted Recognition of the Brazilian Reorganization Plan, Finding that Chapter 15 Does Not Require the Laws of Brazil be Identical to U.S. Laws, Rather Focuses On the Fairness of the Process and Also Found that the Differing Recoveries Were Justified

Granting Third-Party Releases - *Metcalfe & Mansfield and Sino-Forest*

- *Metcalfe & Mansfield* - Debtors Filed Canadian CCAA Proceeding, Canadian Court Approved Plan that Granted Broad Releases in Favor of a Group of Canadian and Foreign Banks, Rating Agencies and Liquidity Providers
- Debtors' Foreign Representatives Commenced Chapter 15 Case in Bankruptcy Court, Southern District of New York
  - Bankruptcy Court approved third party releases that likely would not have been approved in a U.S. Chapter 11 case
  - Similar outcome in case in Bankruptcy Court, Southern District of New York, *Sino-Forest*

Third-Party Releases - *Vitro*

- U.S. Court of Appeals - Fifth Circuit in *Ad Hoc Group of Noteholders v. Vitro S.A.B. de C.V. (In re Vitro S.A.B. de C.V.)* (2012) Reached Opposite Holding:
  - Refused to recognize non-debtor third party releases in Mexican reorganization plan
  - Court found such releases inconsistent with U.S. public policy

Asset Sales - *Hanjin Shipping*

- Foreign Representative Sought Recognition of Korean Court Order Authorizing the Sale of the Debtor's Equity Interest in a Port Facility in California and the Assignment of Certain Leases and Related Assets Free and Clear of Liens Pursuant to Bankruptcy Code Section 363
- Korean Sale Order Required Sale Proceeds to be Repatriated to Korea for Distribution to Creditors Based on Claims Filed There
- Creditors Owed Post-Petition "common benefit claims" Objected, Arguing if Sale is Approved, Funds Should Remain in U.S. for the benefit of U.S. Creditors
- Bankruptcy Court Approved the Sale Over Creditor Objections, Finding Creditors Should Assert Claims in the Korean Proceeding and Assets Better Administered in Korea Where all Claims Pending
- Court Authorized Sale Proceeds to be Sent to Korea

Asset Sales (Cont.) - *Elpida Memory*

- *Elpida Memory (2012)*:
  - Commenced in the Bankruptcy Court for the District of Delaware
  - Ancillary to Japanese reorganization proceeding
  - Foreign debtor sought approval of foreign sale order, urging the Court to forego section 363 sale requirements (business judgment rule) and defer to the Japanese court based on comity
  - Court applied section 363 sale requirements and ultimately approved/recognized the sale

Asset Sales (Cont.) - *Fairfield Sentry*

- U.S. Court of Appeals - Second Circuit, *Fairfield Sentry* – (2014):
  - reversed decision of Bankruptcy Court giving comity to decision approving sale in British Virgin Islands proceeding, and instead required U.S. court to conduct independent section 363 analysis regarding consideration of Virgin Islands sale order
  - On remand, Bankruptcy Court (2015) disapproved of sale as not satisfying Section 363 business judgment standards

Asset Sales (Cont.) - *Pope & Talbot*

- Initially Filed CCAA in Canada and Chapter 11 in U.S. (Delaware)
- CCAA Converted to Liquidation – Canadian Court Appointed a Receiver to Sell all Remaining Assets of *Pope & Talbot* Debtors in U.S. and Canada
- U.S. Cases Converted to Chapter 7
- Canadian Receiver then Filed Chapter 15 in Delaware
  - Bankruptcy Court permitted Receiver to proceed with sale of real property located in State of Washington and other U.S. assets
  - Receiver also permitted to distribute proceeds

Permit Use Of Cash Collateral *In Re Madill Equip. Canada*

- Case Commenced in Part to Permit Foreign Debtor to Use the "Cash Collateral" of U.S. Senior Lenders
- Bankruptcy Court Granted to Senior Lenders Replacement Liens in Debtor's Post-Petition Assets for Any Diminution in the Value of their Collateral and Deemed Such Liens Fully Perfected Without the Need to file UCC Financing Statements – as Would Otherwise be Required

Permit Discovery - *Condor Insurance*

- *Condor Insurance*
  - Case commenced in the Bankruptcy Court for the District of Mississippi
  - Foreign Proceeding commenced in Nevis – liquidation of debtor involved in insurance and surety bond business
  - Debtor's Foreign Representatives commenced Chapter 15 for the purpose of, among other things, obtaining discovery from debtor's asset manager and primary secured lender in an effort to determine the location and ownership of certain assets; discovery was authorized by court

Permit Discovery – *ICP Strategic*

- *ICP Strategic Credit Income Master Fund Ltd.* (2013)
  - Chapter 15 case commenced in the Bankruptcy Court for the Southern District of New York
  - Cayman liquidation proceedings recognized as foreign main proceedings, and Court authorized discovery to identify causes of action and secure any assets they may have in the U.S. for the benefit of creditors

Limits On Chapter 15 Debtor's Foreign Representative's Powers

- *CHAPTER 15 DEBTOR'S FOREIGN REPRESENTATIVE DOES NOT HAVE THE POWER TO COMMENCE U.S. AVOIDANCE ACTIONS IN CHAPTER 15 CASE*
  - Preference
  - Fraudulent transfer
- However…

Limits On Chapter 15 Debtor's Foreign Representative's Powers (Cont.)

- *Fogerty v. Condor Guaranty, Inc.* – U.S. Fifth Circuit
  - Part of the Condor Insurance Chapter 15 case filed in the Bankruptcy Court for the District of Mississippi
  - Fifth Circuit held that debtor's foreign representatives can sue on fraudulent transfer and other avoidance claims arising under foreign (Nevis) law
- Similar Holding as in *Fairfield Sentry*
  - Bankruptcy Court for the Southern District of New York authorized lawsuit based on foreign fraudulent transfer law

U.S. Chapter 15 In Conjunction With Plenary Proceeding In Canada

- Canadian Parties Have Frequently Filed U.S. Chapter 15 Cases in Conjunction with Proceeding originating in Canada
- Canadian Debtors Prefer CCAA and Other Restructuring Cases Because they are Less Costly, Move Quicker and Require Fewer Court Hearings than U.S. Chapter 11
- Canadian Party Commences CCAA and then Files Chapter 15 in U.S.
  - Canadian Court orders are generally recognized and accorded full force and effect in U.S.
  - **The court-appointed Canadian Monitor often maintains a website which serves as great source of information regarding the foreign proceeding**

Cross-Border Insolvencies

- Debtor Simultaneously Subject to Insolvency Laws of Multiple Jurisdictions
  - *Hanjin Shipping* – debtor was forced to commence ancillary recognition proceedings in at least ten (10) countries
- Cross-Border Bankruptcies Generally Involve Multiple Affiliated Entities Operating in Various International Jurisdictions
  - Each jurisdiction has own distinct contradictory laws and procedures

Cross-Border Insolvencies (Cont.)

- Foreign Affiliates Have Pending Foreign Proceeding(s)
- U.S. Affiliate(s) May File Chapter 11 in U.S.
- Alternatively, Debtor May File Chapter 15 in U.S. Ancillary to Foreign Proceeding

Considerations Of Where To File Plenary Insolvency Proceeding

- Advantages/Disadvantages of Jurisdiction's Insolvency Laws, Court Systems and Processes
- "Debtor Friendly" vs. "Liquidation Friendly"
- Availability of DIP Financing
- "Management Administered" vs. "Trustee Administered" Process
- Availability of Automatic Stay, Assumption/Rejection/Assignment of Executory Contracts and Leases, Cramdown

Advantages Of Chapter 11 In Lieu Of Foreign Proceeding

- Unfavorable Foreign Insolvency Law
  - Tend to be liquidation friendly vs. Chapter 11 (more reorganization friendly)
  - Debtor in possession – existing management runs business, instead of Trustee or Administrator (typically appointed in foreign proceeding)
- Foreign Insolvency Law May Provide Limited Framework for Financing During Foreign Proceeding vs. DIP Financing Under Chapter 11

Advantages Of Chapter 11 In Lieu Of Foreign Proceeding (Cont.)

- Automatic Stay, Ability to Assume/Assign/Reject Executory Contracts and Leases in Chapter 11
- U.S. Creditors Prefer U.S. Bankruptcy Proceeding, Rather than Foreign Proceeding that Provides:
  - Weak protections for unsecured and other creditors
  - Weak protections for debtors

Disadvantages Of Chapter 11 In Lieu of Foreign Proceeding

- Limits on Ability to Fund Foreign Entities Via Chapter 11 Financing
- Limits on Ability to Bind Foreign Entities to U.S. Bankruptcy Court Rulings
- U.S. Bankruptcy Court Cannot Resolve Certain Foreign Issues (Particularly Where Assets Beyond Court's Reach)
- Limits of Extraterritorial Application of Automatic Stay Arising from Chapter 11 Filing
  - Certain foreign creditors – *e.g.*, goods suppliers outside of U.S. not controlled by U.S. bankruptcy law will be paid in full

Simultaneous Chapter 11 And Foreign Proceeding – Advantages

- Debtor Receives Benefit of Laws in Home Country and in U.S. Chapter 11
  - Debtor friendly chapter 11 provisions
  - Pension, tax, contractual disputes may be dealt with under foreign law

Simultaneous Chapter 11 And Foreign Proceeding – Disadvantages

- Chapter 11 and Foreign Proceeding Run Separately
  - U.S. and foreign debtor entities treated as separate operating companies
- U.S. and Foreign Jurisdictions Have Their Own Distinct, and Even Contradictory, Laws and Procedures
- Multiple Courts Further Complicate Resolution of Certain Issues
- Risk of Inconsistent Treatment of Claims Across Jurisdictions

Simultaneous U.S. And Canadian Plenary Proceedings

- Cross-Border Insolvency Proceeding Involving Affiliated Debtors Operating in Canada and U.S. and Filing Plenary Proceedings in Canada (e.g., CCAA) and U.S. (Chapter 11)
- Each Proceeding is Subject to its Country's Insolvency Laws
- Canadian and U.S. Proceedings Run Separately
- Multiple Courts Further Complicate Resolving Certain Issues
  - Risk of inconsistent treatment of claims
  - Risk of inconsistent decisions on same issue

Cross Border Protocols

- Used to Coordinate and Harmonize (as Best Possible) Cross-Border Insolvency and Restructuring Cases
- Have Become More Common In Cross Border Cases
- Order Approving Protocol is:
  - Usually agreed upon by stakeholders
  - Approved by courts supervising cross border cases

Cross Border Protocols (Cont.)

- Many Protocols Deal With the Following Matters:
  - Where legal papers must be filed
  - Where claims must be filed, governing law, and which court is responsible for adjudicating claim
  - Recognition of each court's jurisdiction
  - Court to court communications
  - Joint hearing

Cross Border Protocols (Cont.)

- Recent 2017 Amendments to Delaware Bankruptcy Court Local Rules Adopting Part X:
  - GUIDELINES FOR COMMUNICATION AND COOPERATION BETWEEN COURTS IN CROSS-BORDER INSOLVENCY MATTERS
  - Guidelines do not apply automatically – courts in cross border jurisdictions must discuss entry of an order or protocols as noted above
  - Protocols similar to those adopted in prior Cross Border insolvencies in multiple jurisdictions, such as in the AbitibiBowater proceedings

Cross Border Protocols (Cont.)

- Recent Reports of U.S. Bankruptcy Courts Working Cooperatively with Foreign Insolvency Courts, Including in Korea and Singapore, to Implement Cross-Border Protocol Procedures
- Other Courts, Like in the Recent *Hanjin Shipping* Case, Take a More Situation by Situation Approach
  - Coordination between U.S. Bankruptcy Court and Korean insolvency court in connection with asset sale motion

Claims Protocol: Abitibibowater (CCAA Canada, Chapter 11/Chapter 15 U.S. Bankruptcy Delaware)

- Claims Against Canadian (Abitibi) Debtors:
  - Filed in CCAA proceeding in accordance with Canadian Claim Procedures
  - Subject to Canadian procedures for allowance or disallowance of claims and determined in CCAA proceeding
- Claims Against U.S. (Bowater) Debtors:
  - Filed in Chapter 11 case in accordance with Claims Bar Date order
  - Subject to allowance or disallowance of claims in Chapter 11 cases and determined by U.S. Bankruptcy Court

Claims Protocol: Abitibibowater (CCAA Canada, Chapter 11 U.S. Bankruptcy Delaware)

- Claims Against Entities Filing Both CCAA and Chapter 11 Cases ("Cross Border Debtors"):
  - Could be filed in either CCAA or Chapter 11 case
  - Treated as Canadian claim
  - If Creditor, Cross Border Debtors, Unsecured Creditors' Committee ("UCC") in U.S. Chapter 11 and Canadian Monitor cannot agree on resolution or forum to determine objection to claim:
    - Canadian court determines appropriate forum for adjudicating objection
    - If claim is referred to Canadian court for determination, the Canadian claims order governs allowance, amendment or disallowance, and UCC has standing to participate
    - Any party can seek joint hearing of U.S. and Canadian courts to resolve disputes

Questions?

Bruce S. Nathan, Esq.
Partner
Telephone: (212) 204-8686
Facsimile: (973) 422-6851
bnathan@lowenstein.com
www.lowenstein.com

Philip J. Gross, Esq.
Counsel
Telephone: (973) 597-6246
Facsimile: (973) 597-6247
pgross@lowenstein.com
www.lowenstein.com

Lowenstein Sandler

Bruce S. Nathan
Partner

New York
Tel: 212.204.8686 Fax: 973.422.6851
Email: bnathan@lowenstein.com

Practice

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

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

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

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

Education

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

Affiliations

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

Articles/Interviews Featuring Bruce S. Nathan

- **Bruce S. Nathan is quoted in NACM eNews regarding the effect of prepackaged and prearranged chapter 11 plans on unsecured creditors** *NACM eNews*, January 26, 2017
- **Bruce S. Nathan is quoted in Business Credit, attributing the increase of prepackaged Chapter 11 cases as a response to changes in the bankruptcy code in 2005 and the recession in 2008.** *Business Credit,* June 2016
- **Bruce Nathan comments in NACM eNews regarding the U.S. Supreme Court's affirmance of the elimination of limits on creditors' ability to garner a spousal guarantee.** *NACM eNews,* March 24, 2016
- **Bruce S. Nathan is quoted in NACM eNews regarding the tenuous financial condition of certain large retailers, and the risks facing credit professionals in 2016 when making their credit decisions in sales to such retailers.** *NACM eNews,* January 21, 2016
- **Bruce S. Nathan is quoted in NACM eNews, predicting that the recent rate hike and future hikes by the Federal Reserve should increase the number of bankruptcy filings.** *NACM eNews,* December 17, 2015
- **Bruce S. Nathan is quoted in NACM eNews regarding the new official forms, including the new proof of claim form, used in bankruptcy cases, which became effective December 1.** *NACM eNews,* December 10, 2015
- **Bruce S. Nathan is quoted in NACM eNews concerning the increasing number of unsuccessful retail bankruptcy reorganizations.** *NACM eNews,* November 19, 2015
- **Bruce S. Nathan is quoted in NACM eNews regarding the risk of a future bankruptcy filing when a company buys a financially distressed company and in the process overleverages itself.** *NACM eNews,* November 12, 2015
- **Bruce S. Nathan is quoted in NACM eNews regarding the growing competition for retailers such as A&P and other independent retailers from big box retailers, including Walmart and Target.** *NACM eNews,* August 27, 2015
- **Bruce S. Nathan is quoted in NACM eNews concerning the potentially deleterious effects of navigating in and out of bankruptcy court too quickly.** *NACM eNews,* June 25, 2015
- **Bruce S. Nathan comments in NACM eNews regarding the Supreme Court's ruling that bankruptcy courts may not award attorneys' fees for work performed in defending their fee application in court.** *NACM eNews,* June 18, 2015
- **Lowenstein Sandler LLP Selected to Represent Official Committee of Unsecured Creditors of Gourmet Express** March 31, 2015
- **Bruce S. Nathan comments in the May 2014 Financier Worldwide Magazine on identifying early warning signs concerning a financially distressed customer and suggested steps vendors should take to mitigate their losses.** *Financier Worldwide Magazine,* May 2014
- **Lowenstein Sandler Retained as Unsecured Creditors' Counsel in Coldwater Creek Chapter 11 Case** April 25, 2014
- **Bruce S. Nathan is mentioned in Law360 in connection with his representation of the Official Committee of Unsecured Creditors of Coldwater Creek Inc.** *Law360,* April 25, 2014
- **Bruce S. Nathan was quoted in the National Association of Credit Management's eNews regarding claims against General Motors.** *NACM's eNews,* April 24, 2014
- **In NACM's eNews for December 12, 2013, Bruce Nathan comments on how the recent Supreme Court ruling regarding forum-selection clauses continues to allow**

opportunities for subcontractors in contract negotiations. *NACM's eNews,* December 12, 2013

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

Publications

- **"The Strict Compliance Requirement for Letters of Credit is Really Strict,"** Bruce S. Nathan, Eric Chafetz, *Business Credit*, February 2017
- **"A New Preference Defense?,"** Bruce S. Nathan, Barry Z. Bazian, *Business Credit*, January 2017
- **What Constitutes Sufficient Notification of a Security Interest to Cut Off Trade Creditors' Setoff Rights?,"** Bruce S. Nathan, Barry Z. Bazian, *CRF News*, 4th Quarter 2016
- **"Court Ruling A Reprieve for Bankruptcy Reclamation Rights?,"** Bruce S. Nathan, David M. Banker, Barry Z. Bazian, *Business Credit*, November/December 2016
- **"Purchasing Claims Free and Clear of a Debtor's Defenses,"** Bruce S. Nathan, Scott Cargill, *American Bankruptcy Institute Journal*, October 2016
- **"Mind Your Ts and Cs (Terms & Conditions),"** Bruce S. Nathan, Lowell A. Citron, Chad S. Pearlman, *Business Credit*, September/October 2016
- **"A Little More You Need to Know About the "Ordinary Course of Business" and "New Value" Preference Defenses,"** Bruce S. Nathan, David M. Banker, Eric Chafetz, Barry Z. Bazian, *The Credit and Financial Management Review*, 3rd Quarter 2016
- **"Cautionary Tale for Section 503(b)(9) Claimants: Filing a Proof of Claim Might Thwart Recovery,"** Bruce S. Nathan, David M. Banker, *CRF News*, 3rd Quarter 2016
- **"A Preference Split Decision on the New Value and Ordinary Course of Business Defenses: Win Some, Lose Some!,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* July/August 2016
- **"Second Circuit Overturns Visa/MasterCard Antitrust Settlement,"** Bruce S. Nathan, Andrew David Behlmann, *NACM eNews,* July 7, 2016
- **"The Benefits of Properly Documenting a Consignment Transaction and the Potential For Recovery By Creditors that Don't!,"** Bruce S. Nathan, David M. Banker, Barry Z. Bazian, *CRF News,* 2nd Quarter 2016
- **"U.S. Supreme Court's Split Decision on Enforceability of Spousal Guarantee Limits," Bruce S. Nathan,** *Business Credit,* June 2016
- **"Petitioning Creditor Eligibility to Join an Involuntary Bankruptcy Petition,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* May 2016
- **"The Timing of Receipt of Goods in International Transactions Could Be Hazardous to Section 503(b)(9) Priority Status,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* April 2016
- **"Social Media: The New Reality for Credit Professionals,"** Mary J. Hildebrand, CIPP/US/E, Bruce S. Nathan, Cassandra M. Porter, CIPP/US, *CRF News,* 1st Quarter 2016
- **"Spotting the Sinking Ships,"** Bruce S. Nathan, Kenneth A. Rosen, Scott Cargill, *The Financial Manager,* March/April 2016
- **"Letter of Credit Coverage of Preference Risk: Overcoming a Fraud Injunction,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* March 2016
- **"Petitioning Creditors Beware,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* February 2016
- **"More Shocking Developments on Whether Electricity is a Good Entitled to Section 503(b)(9) Administrative Priority Status,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* January 2016
- **"Rolling the Dice: Proving the Subjective Ordinary Course of Business Defense at Trial,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* December 2015
- **"Getting More from a Creditor's Committee,"** Bruce S. Nathan, Eric Chafetz, *CRF News,* 4th Quarter 2015

- **"The Hazards To Secured Status Caused by Minor Mistakes In A Security Agreement,"** Bruce S. Nathan, David M. Banker, *CRF News,* 3rd Quarter 2015
- **"Debtor Setoff Rights Can Endanger Recoveries on § 503(b)(9) Claims,"** Bruce S. Nathan, Scott Cargill, *American Bankruptcy Institute Journal,* October 2015
- **"Section 503(b)(9) Priority Claims Under Attack,"** Bruce S. Nathan, Scott Cargill, *Business Credit,* July/August 2015
- **"Involuntary Bankruptcy Petition Risk: Dismissal Can Be Costly to Petitioning Creditors,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* June 2015
- **"Electronic Signatures Agreements and Documents: The Recipe For Enforceability and Admissibility,"** Bruce S. Nathan, Terence D. Watson, *The Credit and Financial Management Review,* Second Quarter 2015
- **"Triumph over a Secured Lender,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* May 2015
- **"Joint Check Agreement Does Not Cut the Mustard to Avoid Preference Liability,"** Bruce S. Nathan, David M. Banker, *Business Credit,* April 2015
- **"Delaware Bankruptcy Court Grants Summary Judgment Dismissing Preference Complaint Based on Ordinary Course of Business Without a Trial,"** Bruce S. Nathan, David M. Banker, *Business Credit,* March 2015
- **"Creditors Beware: Post-Petition Standby Letter of Credit Payments May Reduce New Value Defense,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* February 2015
- **"A New Twist on the Contract Assumption Defense to Preference Claims,"** Bruce S. Nathan, David M. Banker, *Business Credit,* January 2015
- **"Does the Equal Credit Opportunity Act Apply to Spousal Guarantors? Yes and No!,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* November/December 2014
- **"Paid New Value Preference Defense Prevails Again In Delaware!,"** Bruce S. Nathan, *CRF News,* October 2014
- **"Limits on Foreign Goods Sellers' §503(b)(9) Priority Rights,"** Bruce S. Nathan, Scott Cargill, *American Bankruptcy Institute Journal,* October 2014
- **"Section 503(b)(9) Priority Status Limited for Shipments from Abroad,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* September/October 2014
- **"Materialman's Lien Rights: Post-Petition Perfection Approved,"** Bruce S. Nathan, *Business Credit,* July/August 2014
- **"Expanding the Scope of the Contemporaneous Exchange for New Value Preference Defense to Multiple Party Transactions,"** Bruce S. Nathan, David M. Banker, *Business Credit,* June 2014
- **"Insuring Your Largest Asset, Your Accounts Receivable - Demystifying Credit Insurance and Negotiating the Best Possible Policy,"** Bruce S. Nathan, Christopher C. Loeber, Eric Jesse, *Business Credit,* June 2014
- **"Mistakes in a UCC Financing Statement's Collateral Description Can Be Hazardous to a Perfected Security Interest!,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* May 2014
- **"Another Bankruptcy Blow for Triangular Setoff,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* April 2014
- **"Counting a Creditor's New Value Paid Post-Petition: You Can Have Your Cake and Eat It Too,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* March 2014
- **"Construction Trust Fund Payments as a Defense to Preference Claims: A Matter of Tracing,"** Bruce S. Nathan, *Business Credit,* February 2014
- **"Sparks Continue to Fly – Electricity is not Eligible for Section 503(b)(9) Status and Other Shocking Developments,"** Bruce S. Nathan, Michael S. Etkin, David M. Banker, *Business Credit,* January 2014

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

- **"Who Pays the Freight? Interplay Between Priority Claims and a Debtor's Secured Lender,"** Bruce D. Buechler, Bruce S. Nathan, *American Bankruptcy Institute Journal,* November 2011
- **"Is There a Small Preference Venue Limit? Yes and No!,"** Bruce S. Nathan, *Business Credit,* November/December 2011
- **"Trade Creditor Remedies Manual: Trade Creditors' Rights Under The UCC and the U.S. Bankruptcy Code,"** Bruce S. Nathan, Scott Cargill, *American Bankruptcy Institute,* 2011
- **"Standby Letters of Credit and the Independent Principle,"** Bruce S. Nathan, *Business Credit,* September/October 2011
- **"Another Ordinary Course of Business Preference Defense Double Feature,"** Bruce S. Nathan, *Business Credit,* July/August 2011
- **"Everything You Need to Know About New Value as a Preference Defense, and More,"** Bruce S. Nathan, Scott Cargill, David M. Banker, *The Credit and Financial Management Review,* Second Quarter 2011
- **"Joint Check Agreements: Who's on First?,"** Bruce S. Nathan, *Business Credit,* June 2011
- **"Paid for New Value as a Preference Defense, More Good News for the Trade,"** Bruce S. Nathan, *Business Credit,* May 2011
- **"Reclamation Catch-22: Darned If You Do, Darned If You Don't,"** Bruce S. Nathan, David M. Banker, *Business Credit,* May 2011
- **"Yet Another Favorable Court Decision Upholding the Ordinary Course of Business Preference Defense,"** Bruce S. Nathan, *Business Credit,* April 2011
- **"Counting Section 503(b)(9) Priority Claims as Part of a Creditor's New Value Defense to a Preference Claim: Can You Have Your Cake and Eat It Too?,"** Bruce S. Nathan, *Business Credit,* March 2011
- **"Electricity as Goods Entitled to Section 503(B)(9) Priority Status: A Boom for Utilities,"** Bruce S. Nathan, *Business Credit,* February 2011
- **"Critical Vendor Update,"** Bruce S. Nathan, *Business Credit,* January 2011
- **"The Contract Assumption Defense to Preference Claims: Alive and Thriving,"** Bruce S. Nathan, *Business Credit,* November/December 2010
- **"Proving the Subjective Component of the Ordinary-Course-of-Business Defense,"** Bruce S. Nathan, Scott Cargill, *American Bankruptcy Institute Journal,* November 2010
- **"A Preference Ordinary Course of Business Defense Double Feature,"** Bruce S. Nathan, *Business Credit,* September/October 2010
- **"Do Fully Funded Section 503(b)(9) Priority Claims Count as Additional New Value to Reduce Preference Liability? A Contrary View!,"** Bruce S. Nathan, *Business Credit,* July/August 2010
- **"Section 503(b)(9) Priority Claim Developments: The Beat Goes On!,"** Bruce S. Nathan, *Business Credit,* June 1, 2010
- **"Vendors Beware: The Risk of a Debtor's Unauthorized Post-petition Payments For Post-petition Goods or Services,"** Bruce S. Nathan, *Business Credit,* May 2010
- **"Creditors' Committee Disclosure Obligations Updated: The Use of Internet Websites,"** Bruce S. Nathan, *Business Credit,* April 2010
- **"The Interplay Between Section 503(b)(9) Priority Claims and Preference Claims,"** Bruce S. Nathan, *Business Credit,* March 2010
- **"Section 503(b)(9) Goods Supplier Priority - Beware of the Debtor's Setoff Rights,"** Bruce S. Nathan, *Business Credit,* February 2010
- **"Hooray for Delaware - A Tale of Two Decisions,"** Bruce S. Nathan, *Business Credit,* January 2010

- **"Recent Case Law Developments Concerning Section 503(b)(9) 20-Day Goods Priority Claims,"** Bruce S. Nathan, *Business Credit,* November/December 2009
- **"The 20-Day Goods Priority Claim Under Bankruptcy Code Section 503(b) (9),"** Bruce S. Nathan, Scott Cargill, *The Credit and Financial Management Review,* Fourth Quarter 2009
- **"Compelling Postpetition Trade Credit: Navigating Uncharted Waters,"** Bruce S. Nathan, Scott Cargill, *American Bankruptcy Institute Journal,* October 2009
- **"Compelling Bankruptcy Trade Credit: The Great Unknown,"** Bruce S. Nathan, *Business Credit,* September/October 2009
- **"The Limits of Consignment Rights When Consigned Goods Are Manufactured Into Finished Product,"** Bruce S. Nathan, *Business Credit,* July/August 2009
- **"Enforceability of Triangular Setoff Rights In Safe Harbor Contracts - Still An Open Question? Part 2,"** Bruce S. Nathan, S. Jason Teele, Matthew A. Magidson, *Derivatives Week,* June 29, 2009
- **"Enforceability of Triangular Setoff Rights In Safe Harbor Contracts - Still An Open Question? Part 1,"** Bruce S. Nathan, S. Jason Teele, Matthew A. Magidson, *Derivatives Week,* June 22, 2009
- **"Demystifying Chapter 15 of the Bankruptcy Code,"** Bruce S. Nathan, *Business Credit,* June 2009
- **"Credit Card Payments as Preferences: The Sixth Circuit Joins the Bandwagon,"** Bruce S. Nathan, *Business Credit,* June 2009
- **"Preference Dynamic Duo II: Whatever Happened to the Small Preference Venue Limitation?,"** Bruce S. Nathan, *Business Credit,* May 2009
- **"Triangular Setoff: A Viable Remedy or a Thing of the Past?,"** Bruce S. Nathan, *Business Credit,* April 2009
- **"Is Debtor's Credit Card Payment a Preference,"** Bruce S. Nathan, *Business Credit,* March 2009
- **"Effective Seller Remedies When Confronting a Financially Distressed Buyer Prior to Bankruptcy,"** Bruce S. Nathan, *Business Credit,* February 2009
- **"Recent Court Decisions on Consignments and Other Security Arrangements: The Benefits of Aggressive Creditor Action and the Pitfalls of Failing to Document Properly,"** Bruce S. Nathan, *Business Credit,* January 2009
- **"Builders Trust Fund Payments: A Defense to Preference Exposure,"** Bruce S. Nathan, *Business Credit,* November/December 2008
- **"Impact of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act on Retail Bankruptcies,"** Bruce S. Nathan, *Journal of Trading Partner Practices,* November 11, 2008
- **"Courts Remain Split over Whether a Debtor's Credit Card Payment is an Avoidable Preference,"** Bruce S. Nathan, Scott Cargill, *ABI Journal,* October 2008
- **"Release of State Mechanic's and Other Lien Law Rights As a Defense to Preference Claims? Yes and No!,"** Bruce S. Nathan, *Business Credit,* October 2008
- **"Overseas Bear Stearns Hedge Funds Denied Chapter 15 Relief,"** Bruce S. Nathan, *Business Credit,* July/August 2008
- **"Mechanic's Liens and the Bankruptcy Code,"** Bruce S. Nathan, *Business Credit,* June 2008
- **"Is a Debtor's Credit Card Payment a Preference?,"** Bruce S. Nathan, *Business Credit,* May 2008
- **"PACA Trust Destroyed by Written Agreement Extending Payment Terms,"** Bruce S. Nathan, *Business Credit,* April 2008
- **"State Law Artisans' Lien Rights Defeat Preference Exposure - The Saga Continues,"** Bruce S. Nathan, *Business Credit,* March 2008

- **"The Critical Vendor Roller Coaster,"** Bruce S. Nathan, *Business Credit,* February 2008
- **"Section 503(b)(9) Goods Supplier Priority — More Recent Developments,"** Bruce S. Nathan, *Business Credit,* January 2008
- **"Beware of Claims Bar Dates for Section 503(b)(9) Administrative Priority Claims in Favor of Goods Suppliers,"** Bruce S. Nathan, *Business Credit,* November/December 2007
- **"Are State Preference Laws Preempted by the United States Bankruptcy Code? Not Necessarily!,"** Bruce S. Nathan, Scott Cargill, *The Credit and Financial Management Review, Volume 13, Number 4,* Fourth Quarter 2007
- **"The Risks of a Single Creditor Involuntary Bankruptcy Petition; Tread Extra Carefully!,"** Bruce S. Nathan, *Business Credit,* October 2007
- **"A Preference Dynamic Duo: State Law Lien Rights Defeat Preference Claim While Payment by Credit Card Does Not!,"** Bruce S. Nathan, *Business Credit,* September 2007
- **"Credit Transactions May Be Eligible for the Section 547 (c)(1) Contemporaneous Exchange for New Value Defense to Preference Exposure: The Third Circuit Court of Appeals Speaks,"** Bruce S. Nathan, *Business Credit,* July/August 2007
- **"Preference Checklist,"** Bruce S. Nathan, *Business Credit,* June 2007
- **"Recent Favorable Preference Rulings for Construction Material and Service Suppliers,"** Bruce S. Nathan, *Business Credit,* June 2007
- **"Paid for New Value Really Does Count: An Update on the New Value Defense and Other Preference Issues,"** Bruce S. Nathan, *Business Credit,* May 2007
- **"Recent Case Law Development Under the 2005 Amendments to the Bankruptcy Code—Part II,"** Bruce S. Nathan, Scott Cargill, *Business Credit Journal of NACM Oregon,* May 2007
- **"Reclamation Rights Under BAPCPA: The Same Old Story,"** Bruce S. Nathan, *Business Credit,* April 2007
- **"Recent Case Law Development Under the 2005 Amendments to the Bankruptcy Code—Part 1,"** Bruce S. Nathan, Scott Cargill, *Business Credit Journal of NACM Oregon,* April 2007
- **"The New 20-Day Administrative Claim in Favor of Goods Suppliers: Yes to Priority; No to Immediate Payment,"** Bruce S. Nathan, *Business Credit,* March 2007
- **"The ABCs of Legal Issues Encountered by Credit Professionals,"** Bruce S. Nathan, *Business Credit,* February 2007
- **"Joint Check Arrangement Does Not Protect Against Preference Exposure,"** Bruce S. Nathan, *Business Credit,* January 2007
- **"Bailment Or Consignment: It Makes A Difference!,"** Bruce S. Nathan, *Business Credit,* November/December 2006
- **"The BAPCPA Ordinary Course Of Business Defense To Preference Claims: At Last, A Court Speaks,"** Bruce S. Nathan, *Business Credit,* October 2006
- **"A Trade Creditor's Post-Petition Obligations Under An Unexpired Executory Contract Prior To Assumption Or Rejection: The Muddled State Of The Law,"** Bruce S. Nathan, *Business Credit,* September 2006
- **"Being Fully Secured Defeats Preference Exposure,"** Bruce S. Nathan, *Business Credit,* July/August 2006
- **"Manual of Credit And Commercial Laws,"** Bruce S. Nathan, *National Association of Credit Management (97th Edition),* 2006
- **"Reclamation Manual/Sellers' Rights of Reclamation, Stoppage of Delivery and New Administrative Claim,"** Bruce S. Nathan, *American Bankruptcy Institute,* 2006
- **"Involuntary Bankruptcy Petition Upheld: Media Providers' Claims Against Advertising Agency NOT Subject To Bona Fide Dispute,"** Bruce S. Nathan, *Business Credit,* June 2006

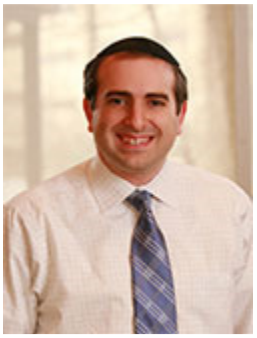
- **"Sales of Trade Claims: The Rewards and The Risks,"** Bruce S. Nathan, *Business Credit,* May 2006
- **"The New Creditors' Committee Disclosure And Solicitation Obligations: The Refco Blueprint!,"** Bruce S. Nathan, *Business Credit,* April 2006
- **"Getting The Biggest Bang For Your New Value Preference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

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

Bar Admissions

- 1981, New York

Lowenstein Sandler



Philip J. Gross
Counsel

New Jersey
Tel 973.597.6246 Fax 973.597.6247
E-mail: pgross@lowenstein.com

Practice

Philip's practice focuses on counseling secured and unsecured creditors, debtors, and committees in commercial bankruptcy proceedings, as well as on providing banks, funds, and other clients with structuring and out-of-court advice. He guides clients through all phases of bankruptcy matters to ensure their success, from pre-bankruptcy negotiations and first-day hearings through plan confirmation and beyond. Philip has extensive experience in national contested bankruptcy hearings and trials, Chapter 15 recognition and Chapter 9 municipality proceedings, and bankruptcy appeals at the federal district and circuit court levels.

Prior to joining Lowenstein Sandler, Philip was an associate at Kaye Scholer LLP in New York City. He served as the 2006 Milton Pollack Fellow in the Southern District of New York (SDNY), where he worked with the Honorable Loretta A. Preska, Chief Judge of the United States District Court for the SDNY, and former Attorney General/SDNY Chief Judge Michael B. Mukasey to draft a report for district court judges on issues and challenges that arise in high-security and terrorism trials, entitled "Guide to High Security & Terrorism Cases" (2006). The guide has been extensively cited in publications issued by the Federal Judicial Center, including Robert Timothy Reagan's "National Security Case Studies: Special Case-Management Challenges" (Federal Judicial Center, June 25, 2013).

Education

- **Fordham University School of Law** (J.D., 2008), *Fordham Urban Law Journal, Notes & Articles Editor; Milton Pollack Fellow (Summer 2006), U.S. District Court, Southern District of New York*
- **Yeshiva University** (B.A., 2002), *Computer Science, summa cum laude*

Representative Experience

- Hanjin Shipping Co., Ltd. – District of New Jersey, Chapter 15 recognition proceeding, counsel to several container terminal operators and railway/transportation carrier.
- Horsehead Holding Corp. – District of Delaware, counsel to official committee of unsecured creditors.
- United Mine Workers of America – bankruptcy counsel to labor union in the following bankruptcy cases: Patriot Coal Corp. (Bankr. E.D. Va.); Walter Energy, Inc. (Bankr. N.D. Ala.); Alpha Natural Resources, Inc. (Bankr. E.D. Va.).
- NJ Healthcare Facilities Management LLC – counsel to secured creditor/nursing home facility owner.

- American Federation of State, County and Municipal Employees (AFSCME) – Detroit's Chapter 9 bankruptcy.
- Universal Cooperatives, Inc. – District of Delaware, counsel to official committee of unsecured creditors.
- Gridway Energy Holdings – District of Delaware, counsel to official committee of unsecured creditors.
- Daytop Village, Inc. – Southern District of New York, counsel to debtors.
- KidsPeace Corporation – Eastern District of Pennsylvania, counsel to official committee of unsecured creditors.
- Velo Holdings Inc. – Southern District of New York, counsel to major creditor/adversary proceeding defendant.
- Hostess Brands, Inc. – Southern District of New York, counsel to amicus curiae party and national pension fund.
- Ocean Place Development, LLC – District of New Jersey, counsel to debtors.
- Coach America Holdings – District of Delaware, counsel to debtors.
- Lighthouse Global Partners, LLC – Southern District of New York, counsel to liquidating trustee.

Articles/Interviews Featuring Philip J. Gross

- **Philip J. Gross is quoted in Debtwire regarding the implications of unresolved legal issues for creditors in Chapter 9 municipal bankruptcy cases.** *Debtwire,* October 20, 2016
- **Philip J. Gross is quoted in the Daily Bankruptcy Review regarding the settlement reached by Glacial Energy Holdings Inc. and the Official Committee of Unsecured Creditors. Gross represents the committee.** *Daily Bankruptcy Review,* June 17, 2014
- **Philip J. Gross is mentioned in Law360 for representing the Official Committee of Unsecured Creditors of Glacial Energy Holdings Inc.** *Law360,* June 16, 2014
- **S. Levine and P. Gross have been recognized in Law360 as "Legal Lions" for representing the American Federation of State, County and Municipal Employees (AFSCME) in its fight for pensions and other benefits in Detroit's Chapter 9 bankruptcy proceeding.** *Law360,* December 5, 2013
- **Sharon L. Levine, Wojciech F. Jung and Philip J. Gross are mentioned in Law360 for representing the American Federation of State County and Municipal Employees (AFSCME) in the Detroit Chapter 9 bankruptcy proceeding.** *Law360,* November 8, 2013
- **Lowenstein Represents Detroit's Largest Union in City Bankruptcy Proceedings** July 2013
- **In The Deal Pipeline, Sharon L. Levine and Philip J. Gross are highlighted for representing the American Federation of State, County and Municipal Employees in the Chapter 9 case of the City of Detroit.** *The Deal Pipeline,* July 24, 2013
- **Norman Kinel and Philip Gross are highlighted for representing Daytop Village, Inc. and Daytop Village Foundation Incorporated in their chapter 11 cases** *The Deal Pipeline,* May 28, 2013

Publications

- **"Does a Bankruptcy Court Have the Authority to Disband an Official Committee?,"** Philip J. Gross, Norman Kinel, *New York Law Journal,* June 3, 2015
- **"Chapter 9 May Be Tough to Swallow for Unions, Retirees,"** Philip J. Gross, *Journal of Corporate Renewal,* June 2014
- **"If You Assign Your Plan Vote — Mean It,"** Wojciech F. Jung, Philip J. Gross, *Law360,* July 9, 2013
- **"Subordination Agreements Work: If You Assign Your Plan Vote – Mean It,"** Wojciech F. Jung, Philip J. Gross, *Bankruptcy, Financial Reorganization & Creditors' Rights Client Alert,* July 3, 2013

Bar Admissions

- 2009, New York
- 2008, New Jersey

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March 2, 2017

IS YOUR SHIP STRANDED AT SEA: DEMYSTIFYING CHAPTER 15 OF THE BANKRUPTCY CODE AND RECENT CROSS-BORDER INSOLVENCY DEVELOPMENTS

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Presented by:

Bruce S. Nathan, Esq.
Partner
Telephone: (212) 204-8686
Facsimile: (973) 422-6851
bnathan@lowenstein.com
www.lowenstein.com

Philip J. Gross, Esq.
Counsel
Telephone: (973) 597-6246
Facsimile: (973) 597-6247
pgross@lowenstein.com
www.lowenstein.com

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Bruce Nathan, Esq.
and Eric Horn, Esq.

Demystifying Chapter 15 of the Bankruptcy Code

It has been nearly three-and-a-half years since the enactment of the cross-border provisions of Chapter 15 of the Bankruptcy Code. Since then, many Chapter 15 cases have been commenced in the United States Bankruptcy Courts. However, despite the large number of Chapter 15 filings, there remains a level of uncertainty as to what exactly Chapter 15 does and how it impacts trade creditors. This uncertainty is fed by the dearth of literature discussing the practical import and impact of Chapter 15 on trade creditors. This article attempts to demystify Chapter 15 by not only providing a general overview of its provisions, but also providing brief case studies exemplifying Chapter 15's practical uses and how such uses have impacted trade creditors.

Despite the large number of Chapter 15 filings, there remains a level of uncertainty as to what exactly Chapter 15 does and how it impacts trade creditors.

General Overview

In an effort to modernize and harmonize cross-border insolvencies throughout the world, in 1997, the United Nations Commission on International Trade Law adopted the Model Law on Cross-Border Insolvency (the "Model Law"). The Model Law offers guidance and

solutions for foreign insolvency proceedings through their recognition by other countries' courts, cross-border cooperation and coordination of concurrent insolvency proceedings in various countries. As of April 2009, the following counties have adopted the Model Law: Australia, the British Virgin Islands, Colombia, Eritrea, Great Britain, Japan, Mexico, Montenegro, New Zealand, Poland, the Republic of Korea, Romania, Serbia, South Africa and the United States.

Chapter 15 adopted and implemented virtually all of the substantive provisions of the Model Law. Chapter 15's main objectives are to advance:

(i) cooperation between United States and foreign courts;
(ii) greater legal certainty for trade and investment;

(iii) efficient administration of cross-border insolvencies that protect the interests of stakeholders;
(iv) protection and maximization of the value of foreign debtors' assets; and
(v) protection of investment, preservation of employment and facilitation of the reorganization of troubled foreign debtors.

How Does Chapter 15 Work?

The threshold requirement for commencing a Chapter 15 case is the existence of a pending foreign insolvency proceeding and a duly authorized representative of that foreign proceeding seeking recognition of that proceeding in the United States. Often, the authorized foreign representative is a critical player (i.e, a receiver, liquidator, etc.) in the foreign insolvency proceeding or the foreign representative could be one of the foreign debtor entities.

Chapter 15 broadly defines a "foreign proceeding" as follows:

> a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

A foreign representative must obtain *recognition* of the foreign proceeding in order to obtain the rights and benefits of Chapter 15, including protecting the foreign debtor's United States assets from creditor action and obtaining access to and relief from the United States courts on most matters. Chapter 15 recognizes two types of "foreign proceedings" pending in another country — namely "foreign main proceedings" and "foreign nonmain proceedings." While these proceedings may appear somewhat identical to an untrained eye, there is an important distinction which is critical to note. If a bankruptcy court recognizes a foreign proceeding as a foreign main proceeding, certain relief becomes automatically available. For instance, the "automatic stay" that trade creditors deal with in Chapter 7, 11 and other bankruptcy cases is immediately available upon the bankruptcy court's recognition of a foreign main proceeding. The stay precludes creditors from seizing the foreign debtor's United States assets or otherwise continuing their litigation and other collection efforts against the debtor. No such stay automatically arises in a foreign nonmain proceeding. If a Chapter 15 petitioner wishes to obtain a stay of creditor actions in a foreign nonmain proceeding, the petitioning party must specifically request such relief from the bankruptcy court and the bankruptcy judge has the discretion of deciding whether or not to grant such relief.

Upon the filing of a Chapter 15 petition, certain parties are notified of the Chapter 15 filing and the relief sought in the case (more on "notice" appears below). The bankruptcy court will typically hold a hearing within 30 days of the Chapter 15 filing to determine whether the foreign proceeding should be recognized as a "foreign main" or "foreign nonmain" proceeding. This hearing is usually referred to as the "recognition hearing."

During the time period between the filing of the Chapter 15 petition and the recognition hearing — frequently referred to as the "Chapter 15 gap period" — the foreign debtor is not protected by any provisions of the Bankruptcy Code, such as the automatic stay. Thus, absent the intervention of the bankruptcy court, creditors are able to take action against the foreign debtor's United States assets, but don't start collecting so fast! In cases where a foreign debtor believes that a stakeholder may take action against the debtor or its U.S. assets, a foreign representative may seek protection by requesting "provisional relief" (usually in the form of injunctive relief) from the bankruptcy court, pending a determination of recognition. For instance, a foreign representative may request immediate implementation of the automatic stay to protect against any attack on the foreign debtor's U.S. assets. "Provisional relief" is not granted without the foreign representative satisfying the usual standards for injunctive relief: (i) a reasonable probability of success on the merits; (ii) irreparable injury by denial of the relief; (iii) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (iv) whether granting the preliminary relief will be in the public interest.

Turning to the recognition hearing, the bankruptcy judge is charged with determining whether the foreign proceeding should be recognized as a foreign main or foreign nonmain proceeding. In determining whether a proceeding is a foreign main proceeding, the bankruptcy court must consider whether the proceeding is pending in the country where the debtor has its "center of main interests." While the Bankruptcy Code does not define "center of main interests," it contains a statutory presumption that, in the absence of evidence to the contrary, the country of the debtor's registered office is presumed to be the center of the debtor's main interests.

Bankruptcy courts also examine other factors in determining whether a foreign proceeding is pending in a jurisdiction where the debtor has its center of main interests so as to be recognized as a foreign main proceeding. For instance, Bankruptcy Judge Lifland, presiding over the *Bear Stearns* Chapter 15 cases, noted the following:

> [v]arious factors could be relevant to such a determination, including: the location of the debtor's headquarters; the location of those who actually manage the debtor . . .; the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.

A foreign nonmain proceeding is a foreign proceeding that is not a foreign main proceeding and is pending in the country

where the foreign debtor has an "establishment." An establishment is any place of operations where the debtor carries out non-transitory economic activity. The presence of a foreign debtor's assets in a jurisdiction, without more, is insufficient to create an establishment that would justify recognizing a foreign proceeding in that jurisdiction as a foreign nonmain proceeding.

Upon a bankruptcy court's recognition of a foreign main or nonmain proceeding in connection with a Chapter 15 filing, the petitioning foreign representative of the debtor is typically authorized to carry out the stated purpose of the debtor's Chapter 15 case. That may include liquidation of the debtor's U.S. assets, giving effect to a foreign plan of liquidation or reorganization or approving a foreign debtor's sale of its assets and/or assignment of its leases located in the United States. Further, to the extent a foreign proceeding is recognized as a foreign main proceeding, the petitioning foreign representative is automatically given many of the powers that a Chapter 11 or 7 debtor/trustee has (other than pursuing avoidance claims, such as preferences), often without further order of the bankruptcy court. The debtor's foreign representative is also often given additional authority, such as the ability to operate the debtor's business, use cash collateral, sell assets, etc. Conversely, to the extent that the proceeding is recognized as a foreign nonmain proceeding, the petitioning foreign representative is granted only those powers as explicitly approved by the bankruptcy court (upon satisfaction of the injunctive relief standard in the case of a continued stay of creditors' actions) and as reflected in the order granting recognition.

Chapter 15 cases have been commenced to bind creditors to the terms of a restructuring plan approved and implemented in a foreign proceeding.

Practically Speaking — What Are Chapter 15s Used for?

Chapter 15s have been filed for various purposes. They are frequently filed to protect a foreign debtor's assets located in the United States from creditor attack. For example, in the recently filed *In re Innua Canada* case — commenced in the Bankruptcy Court for the District of New Jersey, a receivership proceeding had been previously commenced in Canada. Subsequent to the Canadian court's appointment of a receiver, the receiver filed a Chapter 15 in an effort to protect the foreign debtor's inventory located in warehouse containers in New Jersey and Texas from creditor attack. In order to protect those assets during the "Chapter 15 gap period," prior to entry of a recognition order, the receiver also petitioned the bankruptcy court for provisional injunctive relief. The court ruled that the receiver satisfied the standards for an injunction and granted the provisional injunctive relief. The court subsequently recognized the receivership proceeding as a foreign main proceeding—thus activating the automatic stay of Bankruptcy Code Section 362 during the pendency of the Chapter 15 case.

Chapter 15 cases have also been commenced to establish procedures for U.S. creditors to follow for filing proofs of claim against the foreign debtor. For instance, in *In re Quebecor World Inc.,* a Chapter 15 case was commenced in the Bankruptcy Court for the Southern District of New York to approve a claims procedure order, issued by the Canadian court overseeing Quebecor World's Canadian Companies' Creditors Arrangement Act ("CCAA") case, governing the filing of claims by U.S. creditors of Quebecor against Quebecor World in its CCAA case. Specifically, the claims procedure required the filing of claims in Canada — not the United States. The bankruptcy court recognized the CCAA proceeding as a foreign main proceeding and ordered that "[t]he Claims Procedure Order is hereby given full force and effect in the United States and is binding on all persons subject to this court's jurisdiction..." Thus, to the extent that a creditor did not comply with the claims procedure by properly filing a claim in Quebecor's CCAA proceeding in Canada, the creditor would, among other things, be barred from sharing in any distribution made to creditors in that case. All of this played out against the backdrop of a pending Chapter 11 filed by the U.S. Quebecor entities.

Chapter 15 cases have also been commenced to bind creditors to the terms of a restructuring plan approved and implemented in a foreign proceeding. In connection with *Tembec Industries,* a Canadian proceeding under the Canada Business Corporation Act ("CBCA"), Tembec's foreign representative commenced a Chapter 15 case in the Bankruptcy Court for the Southern District of New York in order to implement a Canadian-court-approved restructuring plan in the United States and thus, make the plan binding on all United States creditors subject to the plan.

In *Tembec*, prior to the commencement of the CBCA proceeding, Tembec had issued an outstanding unsecured bond debt in the principal amount totaling approximately USD 1.2 billion (the "Old Notes"). In late 2007, the debtor and the holders of approximately 65% of the outstanding principal amount of the Old Notes had agreed to the terms of a recapitalization, which involved, among other things, equity-for-debt exchanges and new loans. The recapitalization was implemented through a plan under the CBCA (the "Tembec Plan"). The debtor gathered the consents of noteholders, as required by Canadian law, and the Canadian court subsequently approved the Tembec Plan and also authorized the debtor to request the assistance of the United States courts to implement the Tembec Plan in the United States.

Subsequently, in September 2008, Tembec's foreign representative commenced a Chapter 15 case to make the Plan binding on all holders of the Old Notes — including those located in the United States. The Bankruptcy Court for the Southern

District of New York subsequently recognized the CBCA proceeding as a foreign main proceeding and made the Tembec Plan—as well as the Canadian order approving the plan—effective in the United States. The court also permanently enjoined the holders of the Old Notes from taking any action against Tembec's United States assets.

Chapter 15 cases have also been commenced to facilitate asset sales approved in a foreign proceeding. For instance, in *In re Maax Corp.,* a Chapter 15 case was filed in the Bankruptcy Court for the District of Delaware, in part, to give effect to a Canadian court order authorizing the sale of Maax Corp.'s assets (and assignment of leases), free and clear of liens and encumbrances, in the United States pursuant to Bankruptcy Code Section 363. Similarly, in *In re Madill Corp.,* a Chapter 15 case was filed in the Bankruptcy Court for the Western District of Washington to implement an asset sale, free and clear of liens and encumbrances, under Bankruptcy Code Section 363, that was previously approved by the Canadian court pursuant to a Liquidation Services Agreement.

Chapter 15 cases have also been commenced to permit a foreign debtor to use the "cash collateral" of its senior lenders in the United States. In *In re Madill Corp.,* the bankruptcy court granted the Chapter 15 petitioner's request to use the cash collateral of the senior lenders. In exchange, the bankruptcy court granted the senior lenders' replacement liens in Madill's post-petition assets for any diminution in the value of their collateral and deemed such liens fully perfected without the need to file UCC financing statements, as would otherwise be required.

Chapter 15 cases have also been commenced to permit discovery of parties subject to U.S. bankruptcy court jurisdiction. In *In re Condor Insurance,* the debtor's court-appointed liquidators commenced a Chapter 15 case in the Southern District of Mississippi for the purpose of, among other things, obtaining discovery from the debtor's asset manager and the debtor's primary secured lender in an effort to determine the location and ownership of certain assets.

Salient Chapter 15 Points for Trade Creditors to Consider

While the prior section certainly illustrates the many practical uses of Chapter 15, a trade creditor may ask "how does Chapter 15 affect me?" This section provides a roadmap of a few of the salient points that trade creditors should keep in mind when faced with a customer that files Chapter 15 in the United States.

How Does a Trade Creditor Become Aware of a Chapter 15 Filing?

The Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") provide guidance on how creditors receive notice of a foreign debtor's Chapter 15 filing here. Under the Bankruptcy Rules, at least 20 days notice of the Chapter 15 filing must be provided to all entities against whom provisional injunctive relief is sought, all persons that are parties to any U.S. litigation with the Chapter 15 debtor and such other parties as the court may direct. Chapter 15 debtors frequently seek to implement court-approved notice procedures. For instance, in *In re Daewoo Corporation,* one of the earlier Chapter 15 filings, the Bankruptcy Court for the Southern District of New York approved procedures that required notice of the Chapter 15 proceeding and a proposed recognition hearing date by U.S. mail or overnight courier to all known creditors and other parties against whom relief is sought, whether they are inside or outside the U.S., and by publication in *The Wall Street Journal.* Today, the most common practice is for the debtor's foreign representative to move the court to approve procedures that give notice to as many parties in interest as possible, at least the ones mentioned in the Bankruptcy Rules. While court-approved notice procedures are aimed at providing notice to all parties in interest, it is conceivable that certain parties may still not receive notice of a Chapter 15 filing—as often happens in Chapter 11 and 7 cases.

Chapter 15 claims procedures are quite different than claims procedures trade creditors may be used to in their Chapter 7, 11 or other bankruptcy case experiences.

Where Are Claims Filed?

Trade creditors clearly understand the importance of filing a claim in a bankruptcy proceeding. After all, as a general rule, absent the timely filing of a claim, a creditor is unable to share in any distribution made, or otherwise participate, in the bankruptcy case. Chapter 15 claims procedures are, however, quite different than claims procedures trade creditors may be used to in their Chapter 7, 11 or other bankruptcy case experiences. For the most part, claims must be filed as required in the foreign proceeding, rather than in the U.S. bankruptcy court. For example, in *In re MuscleTech,* the District Court for the Southern District of New York approved and implemented a Canadian claims filing procedure, subject to some adjustment by the bankruptcy court to protect U.S. creditors. Additionally, in *Quebecor World,* claims had to be filed in Canada and not the United States.

The bottom line is that trade creditors must pay careful attention to where claims must be filed. Sending claims to the U.S. bankruptcy court where the Chapter 15 is pending—unless specifically authorized to do so—will likely lead to the disallowance of the claim. Also, trade creditors must follow the procedure for filing claims set by the foreign jurisdiction and check whether any order has been entered in the Chapter 15 that modifies this procedure.

Chapter 15 Debtors Have a Lot of Powers

Upon recognition of a Chapter 15 proceeding as a foreign main proceeding, the foreign debtor's representative has

many powers — similar to those granted to a Chapter 11 debtor in possession or trustee. For instance, the debtor's foreign representative is permitted to manage the affairs of the business — including selling assets. Upon recognition of a foreign main or nonmain proceeding, the debtor's foreign representative could also seek court approval to examine witnesses, obtain relief that a bankruptcy trustee could seek, sue or be sued in any United States court, intervene in any lawsuits in which the debtor is a party and obtain relief necessary to protect the debtor's assets or creditors' interests. However, the foreign representative does not have the power to commence most types of avoidance actions, such as preference and fraudulent conveyance actions.

Chapter 15 Debtors May *Not* Commence Avoidance Actions

When faced with a customer that has filed for bankruptcy, one of the first things that comes to a trade creditor's mind is the risk of being sued for recovery of a "preferential payment." In the context of a Chapter 15 case, creditors need not worry — Chapter 15 debtors simply do not have the authority to bring preference and most other avoidance actions, such as fraudulent transfer claims. The Bankruptcy Code specifically prohibits a Chapter 15 debtor from commencing most types of avoidance actions. This prohibition was put to test in *Fogerty v. Condor Guaranty, Inc.,* which was part of the *Condor Insurance* Chapter 15 case commenced in the Bankruptcy Court for the District of Mississippi.

> Chapter 15 debtors simply do not have the authority to bring preference and most other avoidance actions, such as fraudulent transfer claims.

In *Condor Insurance*, a debtor's foreign representatives commenced an adversary proceeding in the bankruptcy court seeking to avoid in excess of $300 million received by Condor affiliates and principals as fraudulent transfers. The defendants moved to dismiss the lawsuit on jurisdictional grounds and the bankruptcy court granted the motion. On appeal to the U.S. District Court, the debtor's liquidators, while conceding that they lacked the power to assert avoidance actions that arise under the Bankruptcy Code, such as a garden variety trade preference claim, argued that they could commence an avoidance action arising under foreign law (as opposed to the Bankruptcy Code). The court rejected that argument and held that under Bankruptcy Code Sections 1521(a)(7) and 1523, a Chapter 15 debtor cannot sue on any preference or fraudulent transfer claim under either United States law or foreign law, unless a Chapter 7 or 11 bankruptcy proceeding is instituted.

Conclusion

As the world's markets become more accessible, cooperation amongst the courts of various nations becomes ever more important. Chapter 15 of the Bankruptcy Code provides a statutory framework for fostering such cooperation in the context of foreign insolvency proceedings. The scope and uses of Chapter 15 — as discussed in this article — are being tested on a daily basis and will continue to be so going forward. Thus, credit executives dealing with foreign customers should have a general understanding about how Chapter 15 works and know what to look for when confronted with a Chapter 15. ●

Bruce Nathan, Esq. is a partner in the New York City office of the law firm of Lowenstein Sandler PC. He is a member of NACM and is on the Board of Directors of the American Bankruptcy Institute and is a former co-chair of ABI's Unsecured Trade Creditors Committee. He can be reached via email at bnathan@lowenstein.com.

Eric Horn, Esq. is counsel in the New Jersey office of Lowenstein Sandler PC. He can be reached at ehorn@lowenstein.com.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

Caption in Compliance with D.N.J. LBR 9004-1(b)
COLE SCHOTZ P.C.
Court Plaza North
25 Main Street
P.O. Box 800
Hackensack, New Jersey 07602-0800
Ilana Volkov
ivolkov@coleschotz.com
Edward S. Kiel
edward.kiel@coleschotz.com
(201) 489-3000
(201) 489-1536 Facsimile
Attorneys for Tai-Soo Suk, Foreign Representative of Hanjin Shipping Co., Ltd.

Case No. 16-27041 (JKS)

In re:

HANJIN SHIPPING CO., LTD.,[1]

Debtor in a Foreign Proceeding.

Chapter 15

Hearing Date and Time:
September 9, 2016, 10:00 a.m.

ORDER GRANTING PROVISIONAL RELIEF PURSUANT TO SECTIONS 362, 365(E), 1519, 1520, AND 105(A) OF THE BANKRUPTCY CODE PENDING HEARING ON PETITION FOR RECOGNITION AS A FOREIGN MAIN PROCEEDING

The relief set forth on the following pages, numbered two (2) through ten (10), is hereby **ORDERED**.

DATED: September 9, 2016

Honorable John K. Sherwood
United States Bankruptcy Court

[1] The last four digits of Hanjin Shipping Co., Ltd.'s Business Registration Number are 1835. The Debtor's main corporate and mailing address is Hanjin Shipping Bldg., 25 Gukjegeumyung-Ro 2-Gil, Yeongdeungpo-Gu, Seoul 07327, Korea.

Upon the motion (the "Motion")[2] of Tai-Soo Suk, the duly appointed foreign representative (the "Foreign Representative") of Hanjin Shipping Co. Ltd. ("Hanjin," the "Company" or the "Debtor"), for entry of a provisional order granting recognition of foreign main proceeding and certain related relief pursuant to sections 362, 365, 1517, 1519, 1520, 1521, and 105(a) of title 11 of the United States Code (the "Bankruptcy Code"); and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334 and 11 U.S.C. §§ 109 and 1501; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. § 1410; and due and proper notice of the provisional relief sought in the Motion having been provided; and it appearing that no other or further notice need be provided; and an interim hearing having been held on September 6, 2016, to consider the relief requested in the Motion (the "Interim Hearing"); and the appearances of all interested parties having been noted in the record of the Hearing; and the Court having entered an Interim Order granting the Motion on September 6, 2016 [Docket No. 22] (the "Interim Order") and scheduling a final hearing on the Motion for September 9, 2016 (the "Final Hearing"); and upon the Declarations in Support, and the verified chapter 15 petition, filed contemporaneously with the Motion, the record of the Interim Hearing, the Final Hearing and all other proceedings heretofore had before the Court; and the Court having found and determined that the provisional relief sought in the Motion is in the best interests of the Debtor, its creditors,

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

"cargo interests," and all other parties in interest and that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor,

THIS COURT HEREBY FINDS AND DETERMINES THAT:

A. The findings and conclusions set forth herein constitute this Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedures (the "Bankruptcy Rules") made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

B. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334.

C. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(P).

D. Venue for this proceeding is proper before this Court pursuant to 28 U.S.C. § 1410.

E. The Foreign Representative has demonstrated a substantial likelihood of success on the merits that (a) the Korean Proceeding is a "foreign main proceeding" as that term is defined in section 1502(4) of the Bankruptcy Code, (b) the Foreign Representative is a "foreign representative" as that term is defined in section 101(24) of the Bankruptcy Code, (c) all statutory elements for the relief granted herein are satisfied in accordance with section 1517 of

the Bankruptcy Code, (d) upon recognition of the Korean Proceeding as a foreign main proceeding, section 362 of the Bankruptcy Code will automatically apply in this chapter 15 case pursuant to section 1520(a)(1) of the Bankruptcy Code, and (e) that application of section 365(e) to prevent contract counterparties from terminating their prepetition contracts with Hanjin is entirely consistent with the injunctive relief afforded by the automatic stay under section 362.

F. The Foreign Representative has demonstrated that (a) the commencement or continuation of any proceeding or action in the U.S. against Hanjin and its business and all of its assets should be stayed on a provisional basis pursuant to sections 1519, 1521, and 105(a) of the Bankruptcy Code, which protections, in each case, shall be coextensive with the provisions of section 362 of the Bankruptcy Code, to permit the fair and efficient administration of the Korean Proceeding for the benefit of all stakeholders, and (b) the benefits of the relief granted herein outweigh the hardships to any parties in interest that have objected to such relief.

G. The Foreign Representative has demonstrated that without the protection of sections 362 and 365(e) of the Bankruptcy Code on a provisional basis, there is a material risk that counterparties to certain of Hanjin's contracts may take the position that the commencement of the Korean Proceeding or this chapter 15 case allows them to terminate such contracts or continue litigation in the U.S. Such positions would severely impair Hanjin's restructuring efforts and result in irreparable damage to Hanjin's business, the value of Hanjin's assets and substantial harm to Hanjin's creditors and other parties in interest.

H. The Foreign Representative has demonstrated that absent the relief granted herein, there is a material risk that one or more parties in interest will take action against Hanjin or its assets. As a result, Hanjin may suffer immediate and irreparable injury, loss, or damage for which there is no adequate remedy at law and therefore it is necessary that this Court grant the relief requested in the Motion. Further, unless this Order is entered, Hanjin's assets could be subject to efforts by creditors to control, possess, or execute upon such assets located in the territorial jurisdiction of the United States and such efforts could result in Hanjin suffering immediate and irreparable injury, loss or damage by, among other things, creditors (a) interfering with the jurisdictional mandate of this Court under chapter 15 of the Bankruptcy Code, and (b) interfering with or undermining the success of the Korean Proceeding.

I. The provisional relief sought is urgently needed to protect the Debtor's assets, will benefit Hanjin's creditors and outweighs the harm to any parties in interest objecting to the provisional relief.

J. The interests of the public and public policy of the U.S. will be served by entry of this Order.

K. The Foreign Representative and Hanjin are entitled to the full protections and rights available pursuant to section 1519(a)(1)-(3) of the Bankruptcy Code.

IT IS HEREBY ORDERED THAT:

1. The Motion is granted as set forth herein.

2. The Provisional Order and the Korean Commencement Order hereby are given full force and effect on a provisional basis, including, without limitation, staying the commencement or continuation of any actions against Hanjin or any assets of Hanjin located within the territorial jurisdiction of the United States, and shall be given full force and effect in the U.S. until otherwise ordered by this Court.

3. While this Order is in effect, the Foreign Representative and Hanjin are entitled to the full protections and rights pursuant to section 1519(a)(1), which protections shall be coextensive with the provisions of section 362 of the Bankruptcy Code, and this Order shall operate as a stay of any execution against Hanjin's assets within the territorial jurisdiction of the U.S..

4. While this Order is in effect, pursuant to sections 1519(a)(3) and 1521(a)(7) of the Bankruptcy Code, sections 362 and 365(e) of the Bankruptcy Code are hereby made applicable in this case to Hanjin and the property of Hanjin within the territorial jurisdiction of the U.S. including owned, operated or chartered (leased) vessels or property thereon (including bunkers) and any other transportation equipment (including containers and chassis) (collectively, the "Hanjin Assets"). Specifically, all entities (as that term is defined in section 101(15) of the Bankruptcy Code), other than the Foreign Representative and its expressly authorized representatives and agents are hereby enjoined from:

a) execution against any of the Hanjin Assets;

b) the commencement or continuation, including the issuance or employment of process, of a judicial, quasi judicial, administrative, arbitral, or other action or

proceeding or process whatsoever, or to recover a claim, including without limitation any and all unpaid judgments, settlements, or otherwise, against the Foreign Representative (with respect to Hanjin), Hanjin or any of the Hanjin Assets;

c) taking or continuing any act to create, perfect, or enforce a lien or other security interest, set-off (except as provided in the protocol attached hereto as Exhibit A), or other *in personam*, *in rem* or *quasi in rem* claim against against the Foreign Representative (with respect to Hanjin), Hanjin, any of the Hanjin Assets, or any asset or property chartered, leased, managed or operated, but not owned, by Hanjin that is located in the territorial jurisdiction of the United States (the "Non-Hanjin Related Assets");

d) transferring, relinquishing, or disposing of any of the Hanjin Assets to any entity (as that term is defined in section 101(15) of the Bankruptcy Code) other than the Foreign Representative , Hanjin or Hanjin's affiliates, except with the consent of the Foreign Representative, Hanjin or Hanjin's affiliates, which consent shall not be unreasonably withheld, and except as provided in the protocol attached hereto as Exhibit A;

e) commencing or continuing an individual action or proceeding within the territorial jurisdiction of the United States concerning Hanjin, Hanjin Assets, Hanjin's rights, obligations, or liabilities;

f) terminating or modifying any contract or unexpired lease of Hanjin and any right or obligation under such contract or lease at any time after the commencement of this case solely because of a provision in such contract or lease that is conditioned on the (i) insolvency or financial condition of Hajin at any time before the closing of this case; or (ii) the commencement of this case; or (iii) the appointment of or taking possession by a trustee or custodian before the commencement of this case;

g) taking or continuing any act to obtain possession of, or exercise control over (including, but not limited to, seeking the issuance of or issuing any restraining notice or other process or encumbrance with respect to), the Foreign Representative (with respect to Hanjin), Hanjin, any of the Hanjin Assets, or the Non-Hanjin Related Assets.

h) arresting or attaching any vessel or other transportation equipment that is owned by, operated by or chartered to Hanjin;

provided, in each of paragraphs 4(a) through (h), such injunction shall be effective solely within the territorial jurisdiction of the United States.

5. Notwithstanding anything to the contrary contained herein, with respect to any loaded containers currently on land in the United States for which ocean freight has been or is paid in full as of the date of the release, the Foreign Representative shall be deemed to have consented to the release of any such loaded containers.

6. Nothing in this Order (including without limitation paragraphs 4(c) or 4(g)) should be deemed to (a) impair or otherwise impact the creation and/or continued existence of any possessory liens that exist or may exist in the future by operation of law; or (b) require third parties (including but not limited to terminal operators or cargo transportation carriers) that currently maintain or in the future will maintain possessory liens in Hanjin's property or assets (including but not limited to Hanjin containers) to relinquish such liens in their collateral (including but not limited to Hanjin's containers); provided that vessel arrest shall not be permitted.

7. Notwithstanding anything to the contrary contained herein, this Order shall not be construed as (a) enjoining the police or regulatory act of a governmental unit, including a criminal action or proceeding, to the extent not stayed pursuant to section 362 of the Bankruptcy Code, or (b) staying the exercise of any rights that section 362(o) of the Bankruptcy Code does not allow to be stayed.

8. Except for the MV/Hanjin Montevideo which shall be the subject of a separate order, to the extent any of the Hanjin Assets were arrested before August 31, 2016

pursuant to an order entered by a U.S. District Court, such arrests shall remain in place pending further order of this Court, except that:

a) The Foreign Representative is authorized, in his sole discretion, to post substitute security and/or pay appropriate *custodial legis* expenses in an amount determined by the U.S. District Court for the district in which the Hanjin Assets or Non-Hanjin Related Assets were arrested without prejudice to any party's right to contest the underlying validity of the arrest or the amount of the substitute security posted or *custodial legis* expenses paid;

b) Upon the provision of substitute security, the U.S. District Court with jurisdiction over the Hanjin Assets or Non-Hanjin Related Assets that has been arrested is authorized immediately to release such Hanjin Assets or Non-Hanjin Related Assets; and

c) The substitute security provided will be held pending further order of this Court or the U.S. District Court where the matter at issue is pending.

9. To the extent any of the Hanjin Assets were arrested on and after August 31, 2016, such arrests hereby are vacated and rendered null and void in their entirety.

10. Pursuant to Rule 7065 of the Federal Rules of Bankruptcy Procedure, the security provisions of Rule 65(c) of the Federal Rules of Civil Procedure are waived.

11. Pending the entry of an order in connection with the Recognition Hearing and subject to the terms of this Order, the Foreign Administrator is entrusted with administering and/or realizing all of the Hanjin Assets and is authorized to operate Hanjin's business in the United States.

12. The Foreign Representative, Hanjin, and their respective agents are authorized to serve or provide any notices required under the Bankruptcy Rules or local rules of this Court.

13. Notwithstanding any applicability of any Bankruptcy Rules, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

14. The Foreign Representative is authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

15. This Court shall retain exclusive jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation and/or enforcement of this Order.

16. Notwithstanding anything herein to the contrary, the relief requested herein shall be subject to (a) the rights, limitations, and protections afforded by Section 1522 of the Bankruptcy Code and (b) the rights of any party to seek relief from this Order. Nothing in this Order shall determine whether section 365 (other than Section 365(e)) applies to an executory contract or the applicable law and appropriate forum for the adjudication of any disputed matters relating thereto, all of which rights shall be reserved.

17. Within five (5) business days hereof, this Order shall be served upon known parties-in-interest at the time of such service. Such service shall be deemed good and sufficient notice for all purposes.

EXHIBIT A

For cargo yet to have been berthed and worked by the terminal and not already inland, nothing in this order or any other applicable law shall prohibit or impair the ability of any Beneficial Cargo Owner, agent or other third party logistics provider to enter into an agreement (the "Release Agreement") with any third-party or third parties (including, without limitation a Terminal Operator, Cargo Transportation Carrier, or any third party logistics provider) at the Beneficial Cargo Owner's or third party's expense based on reasonable, customary or agreed upon rates for any services provided by any Terminal Operator, Cargo Transportation Carrier, or any third party logistics provider to allow such Beneficial Cargo Owner to obtain custody and/or control of such Beneficial Cargo Owner's goods, including, but not limited to, services for removing such goods and/or container from any vessel or any terminal facility or Cargo Transportation Carrier, transporting such goods, storage, and/or demurrage, freight charges, flip charges, and/or any other charges incurred in handling such goods and/or containers, provided that such Beneficial Cargo Owner has paid to Hanjin the full ocean freight charges, less the sum of (i) any amounts previously paid to Hanjin for delivery of the affected cargo, and (ii) any amounts paid or required to be paid to a party other than Hanjin for obtaining custody and/or control of such Beneficial Cargo Owners goods at the regular rates that Hanjin contracted with a Terminal Operator, Cargo Transportation Carrier, or any third party logistics provider, and provided that, no amounts already paid by Hanjin to the Terminal Operator, Cargo Transportation Carrier, or any third party logistics provider will be deducted. As used herein, full ocean freight means the full contract charge provided in the contract with Hanjin for the delivery of the affected cargo as in effect as of the petition date.

Hanjin shall reasonably cooperate with all such Beneficial Cargo Owner, Terminal Operator, Cargo Transportation Carrier or any third party logistics provider efforts including, without limitation, releasing of "line Hold" or bill of lading changes or effectuating "customs clearance" on such goods or other similar action to effectuate the desired result of a Beneficial Cargo Owner. To the extent Hanjin fails to reasonably cooperate with a Beneficial Cargo Owner, Terminal Operator, Cargo Transportation Carrier or any third party logistics provider in connection with the applicable Release Agreement, such Beneficial Cargo Owner, Terminal Operator, Cargo Transportation Carrier or any third party logistics provider may request relief from this Court on two (2) calendar days' written notice. Hanjin's interest in any container containing Beneficial Cargo Owner goods shall not impair the rights of a Beneficial Cargo Owner under this paragraph or excuse compliance by Hanjin with this paragraph. Each Beneficial Cargo Owner that offers any payment pursuant to the terms hereof (assuming the Terminal Operator, Cargo Transportation Carrier or third party logistics provider otherwise agrees to accept such payment in consideration for releasing its possessory lien on any of Hanjin's property) shall be fully subrogated to the rights, liens and claims of any party paid and otherwise reserves all of its rights to assert a claim against Hanjin on account of any payment made by a Beneficial Cargo Owner pursuant to the terms hereof. Notwithstanding the stay or injunction imposed herein nor any other applicable law, to the extent a Terminal Operator, Cargo Transportation Carrier or other party possessing Hanjin property obtains payment (in an agreed upon amount agreed upon by the parties), the Terminal Operator, Cargo Transportation Carrier, or other party possessing Hanjin property (including, but not limited to, Hanjin shipping containers) shall be permitted to transfer, relinquish or dispose of such property immediately free and clear of any liens, claims and interests and released from any and all liability related to the

release of such property including any disgorgement and avoidance, without further relief from this Court.

This Exhibit A shall not apply to the BCO's cargo in containers for which Hanjin has paid all contracted charges due from Hanjin to the Terminal Operator, Cargo Transportation Carrier, or any third party logistics provider.

Any party in interest not in agreement with this protocol may seek relief from this Court on notice to the Foreign Representative.

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Bruce Nathan, Esq. and Richard Corbi, Esq.

SELECTED TOPIC

The Unenforceability of a Foreign Court Order Releasing Non-Debtor Guarantee Claims: The Limits of the Comity Doctrine

The increased frequency of cross border insolvency cases has raised issues about the enforceability in the United States of orders entered in a foreign insolvency proceeding. The rule of comity requires a United States bankruptcy court, on most occasions, to enforce an order entered in a foreign proceeding, unless the foreign order is found to be "manifestly contrary to U.S. public policy."

Recently, the United States Bankruptcy Court for the Northern District of Texas, in *In re Vitro, S.A.B. DE C.V.,* tested the limits of the comity doctrine. In the Vitro case, the bankruptcy court refused to enforce an order approving Vitro's reorganization plan in Vitro's insolvency case pending in Mexico.

The *Vitro* court refused to enforce Vitro's plan because of the provision that released the guarantee claims of U.S. bondholders against Vitro's subsidiaries who are not debtors in the insolvency proceeding in Mexico (the non-debtor Vitro subsidiaries). The court noted that United States bankruptcy law precludes the discharge of claims against nondebtor entities and held that Vitro's plan is not enforceable because it violated U.S. public policy.

Facts

Vitro, S.A.B. de C.V. (Vitro) and its subsidiaries are the largest manufacturers of glass containers and flat glass in Mexico. Vitro is a holding company organized in Mexico that conducts substantially all of its multinational operations through its subsidiaries. Vitro and its subsidiaries have manufacturing facilities in 11 countries and distribution centers throughout the Americas and Europe.

Vitro issued notes in the aggregate principal amount of approximately $1.2 billion to numerous U.S bondholders. The notes are general unsecured obligations of Vitro. Substantially all of Vitro's indirect and direct subsidiaries, including the non-debtor Vitro subsidiaries, guaranteed the full payment of the notes.

On December 13, 2010, Vitro filed a voluntary judicial reorganization proceeding (the foreign proceeding) under the *Ley de Concursos Mercantiles* (the Mexican Bankruptcy Reorganization Act) in Mexico's Federal District Court for Civil and Labor Matters for the State of Nuevo Leon. Vitro sought approval of a prepackaged *concurso* restructuring plan of reorganization for Vitro.

When Vitro commenced the Mexico foreign proceeding, the total outstanding indebtedness owed to Vitro's creditors, excluding intercompany indebtedness, totaled approximately $1.7 billion, of which approximately $1.2 billion was owing on the Vitro notes.

On January 7, 2011, the district court denied Vitro's request for a *concurso mercantile* to adjudicate Vitro as a debtor in the foreign proceeding. The district court's decision was appealed and on April 8, 2011, an appellate court reversed the district court's ruling and issued a declaration of *concurso mercantile* adjudicating Vitro as a debtor in Mexico.

Soon thereafter, Vitro filed its Chapter 15 petition in the United States Bankruptcy Court for the Southern District of New York. The venue of Vitro's Chapter 15 case was transferred to the United States Bankruptcy Court for the Northern District of Texas. Vitro ultimately obtained bankruptcy court approval recognizing the foreign proceeding.

In August 2011, the U.S. bondholders holding Vitro notes guaranteed by the non-debtor Vitro subsidiaries commenced suit in the New York state court seeking a money judgment on their guarantees and a declaratory judgment that Vitro's reorganization would not impact their ability to collect their guarantee claims against the subsidiaries. The New York state court ruled in favor of the bondholders, holding that the subsidiaries' guarantees could not be modified in the foreign proceeding.

On February 3, 2012, the district court approved the *concurso* reorganization plan in the foreign proceeding (the *concurso* plan approval order). That included approval of the plan's provision releasing the bondholders' guarantee claims against the non-debtor Vitro subsidiaries. Despite the issuance of the approval order, the U.S. bondholders continued their U.S. lawsuit to collect their guarantee claims against the non-debtor subsidiaries.

On March 2, 2012, Vitro's foreign representatives filed a motion in the bankruptcy court to enforce the plan in the United States and stay the bondholders' pending litigation in New York to collect their guarantees. The bondholders objected to this enforcement motion. After the bankruptcy court granted a temporary restraining order that temporarily stayed the New York State litigation, the court held a trial on the enforcement motion.

The bankruptcy court considered two issues: (a) whether the comity doctrine requires approval of the provisions of the *concurso* plan approval order that discharged the obligations of the non-debtor Vitro subsidiaries to the U.S. bondholders on their guarantee claims; and (b) if so, whether the public policy exception for foreign orders, that are "manifestly contrary" to U.S. public policy, prevents enforcement of the *concurso* plan approval order?

Overview of Chapter 15

Chapter 15 contains the rules and procedures that a foreign debtor can utilize to facilitate a foreign insolvency proceeding in the United States. Chapter 15 cases are filed to protect a foreign debtor's assets and business in the United States from creditor enforcement actions and allow a foreign debtor to obtain relief from the United States courts on most matters.

A foreign representative in a foreign insolvency proceeding commences a Chapter 15 case by filing a petition for Chapter 15 relief with a U.S. bankruptcy court. Bankruptcy Code section 101(23) defines a foreign proceeding as a "collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control and supervision by a foreign court, for the purpose of reorganization or liquidation." The Mexico foreign proceeding qualifies as a foreign proceeding.

Bankruptcy Code section 101(24) defines a foreign representative as the agent appointed in the foreign proceeding to oversee the reorganization or liquidation of the foreign debtor and represent the debtor in any foreign court, such as a U.S. bankruptcy court. There was no issue that Vitro's foreign representatives were eligible to seek relief under Chapter 15.

Despite the issuance of the approval order, the U.S. bondholders continued their U.S. lawsuit to collect their guarantee claims against the non-debtor subsidiaries.

A foreign representative must obtain recognition of the foreign proceeding in order to obtain the rights and benefits afforded by Chapter 15. According to section 1521(a) of the Bankruptcy Code, that includes authorizing a bankruptcy court to "grant any appropriate relief" in order to "effectuate the purpose of this chapter and to protect the assets of the debtors or the interests of the creditors." According to section 1521(b), that also includes entrusting "the distribution of all or part of the debtor's assets located in the United States to the foreign representative or another person, including an examiner, authorized by the court, *provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected*" (emphasis added). In addition, section 1507(a) of the Bankruptcy Code states that "the court, if recognition is granted, may provide additional assistance to a foreign representative." However, according to section 1507(b), there must be reasonable assurance of the: "1) just treatment of all holders of claims against or interests in the debtor's property; 2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding; [and] 3) prevention of preferential or fraudulent dispositions of property of the debtor."

Section 1506 of the Bankruptcy Code further states that "[n]othing in [Chapter 15] prevents the court from refusing to take an action governed by [Chapter 15] if the action would be manifestly contrary to the public policy of the United

States." While the Bankruptcy Code does not define "manifestly contrary to the public policy of the United States," the courts have focused on whether: (i) the foreign proceeding is procedurally unfair; and (ii) the application of the foreign law would "severely impinge the value and import" of a U.S. statutory or constitutional right so that granting comity would "severely hinder" the U.S. bankruptcy court's ability to protect those rights.

The U.S. Bondholders' Objections to the Bankruptcy Court's Enforcement of Approval Order

The U.S. bondholders raised several objections to the enforcement motion. First, they claimed the *concurso* reorganization plan provision, that discharged the bondholders' guarantee claims against the non-debtor Vitro subsidiaries, violated Bankruptcy Code section 1507(b) by improperly discriminating between Vitro's foreign and non-foreign creditors. The bondholders next argued that the plan had improperly treated the subsidiaries as debtors without providing their creditors, including the U.S. bondholders, any opportunity to vote on the plan. The bondholders then asserted the plan had violated the absolute priority rule, precluding approval of the plan, because Vitro's equity holders were permitted to retain their equity interests in Vitro without fully paying Vitro's unsecured creditors' claims. Finally, the bondholders claimed that the plan's deficiencies violated U.S. public policy.

The *Vitro* Court Holding

The *Vitro* bankruptcy court denied the enforcement motion and refused to recognize and enforce the *concurso* plan approval order. First, the court took issue with the plan's discharge of the bondholders' guarantee claims against the non-debtor subsidiaries because they were not debtors in the foreign proceeding. The United States Bankruptcy Code does not permit the discharge of claims against non-debtor entities. As such, Vitro's plan provision, that improperly discharged and released the U.S. bondholders' claims against the subsidiaries, was not enforceable in the Chapter 15 case because such relief would not have been enforceable in a U.S. Chapter 11 case.

Second, the order, "neither sufficiently protect[ed] the interests of creditors in the United States, nor [did] it provide an appropriate balance between the interests of creditors and [Vitro] and its non-debtor subsidiaries." The bankruptcy court concluded that Vitro was improperly attempting to distribute the assets of the subsidiaries through the plan without sufficiently protecting U.S. creditors, such as the U.S. bondholders, precisely the result Vitro could not achieve in a U.S. bankruptcy proceeding.

Third, the bankruptcy court examined the public policy exception to Chapter 15's recognition of the comity doctrine that gives deference to foreign court orders. The court concluded that the protection of third-party claims in a bankruptcy case "is a fundamental policy of the United States." The order violated U.S. public policy by improperly discharging and releasing the U.S. bondholders' guarantee claims against the subsidiaries.

The court was also troubled by the plan's violation of section 1507 of the Bankruptcy Code by permitting Vitro's equity to retain $500 million of value while the bondholders did not receive full payment of their notes. The plan, therefore, ran afoul of the absolute priority rule, which is one of the requirements for approval of a Chapter 11 plan, because the plan did not provide for the full payment of Vitro's unsecured creditors' claims.

The court was also concerned that the Mexico district court allowed Vitro insiders to vote in favor of Vitro's plan and counted their votes. The insiders' votes in favor of the plan swamped the bondholders' votes rejecting the plan and resulted in creditor approval of the plan. Of particular concern to the bankruptcy court was Vitro's issuance of bonds to insiders, including the subsidiaries, shortly before the filing of the plan. That allowed Vitro to obtain sufficient creditor acceptance to obtain approval of its plan. In effect, the subsidiaries were permitted to vote to discharge and extinguish their own guarantees under the plan.

While the bankruptcy court did not reject the plan based on improper voting by Vitro's insiders and the plan's violation of the absolute priority rule, the court invited consideration of these matters by an appellate court in the event of an appeal of its order. The United States Court of Appeals for the Fifth Circuit will have the opportunity to consider these issues, as well as the ruling of the *Vitro* court denying enforcement of the *concurso* plan approval order. The *Vitro* ruling has been appealed directly to the United States Fifth Circuit Court of Appeals. The briefing is scheduled for completion in September 2012, and oral argument will be scheduled shortly thereafter.

Implications of the *Vitro* Decision

According to the *Vitro* decision, any discharge of U.S. creditors' claims against non-debtor affiliated entities in a foreign insolvency proceeding is an improper circumvention of the United States Bankruptcy Code that would not be enforceable in the United States. This should ease the fears of all categories of U.S. creditors that their cross-border claims will not be honored in the United States, at least for the time being. All eyes are now on the current pending appeal in the U.S. Fifth Circuit Court of Appeals that will be addressing the enforceability of a foreign order releasing claims against a non-debtor. ●

Bruce Nathan, Esq. is a partner in the New York City office of the law firm of Lowenstein Sandler PC. He is a member of NACM and is on the Board of Directors of the American Bankruptcy Institute and is a former co-chair of ABI's Unsecured Trade Creditors Committee. He can be reached via email at bnathan@lowenstein.com.

Richard Corbi, Esq. is an associate in the law firm of Lowenstein Sandler PC. He can be reached at rcorbi@lowenstein.com.

LOCAL RULES

FOR

THE UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

(Effective February 1, 2017)

PART X. GUIDELINES FOR COMMUNICATION AND COOPERATION BETWEEN COURTS IN CROSS-BORDER INSOLVENCY MATTERS

INTRODUCTION

A. The overarching objective of these Guidelines is to improve in the interests of all stakeholders the efficiency and effectiveness of cross-border proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction ("Parallel Proceedings") by enhancing coordination and cooperation among courts under whose supervision such proceedings are being conducted. These Guidelines represent best practice for dealing with Parallel Proceedings.

B. In all Parallel Proceedings, these Guidelines should be considered at the earliest practicable opportunity.

C. In particular, these Guidelines aim to promote:

(i) the efficient and timely coordination and administration of Parallel Proceedings;

(ii) the administration of Parallel Proceedings with a view to ensuring relevant stakeholders' interests are respected;

(iii) the identification, preservation, and maximization of the value of the debtor's assets, including the debtor's business;

(iv) the management of the debtor's estate in ways that are proportionate to the amount of money involved, the nature of the case, the complexity of the issues, the number of creditors and the number of jurisdictions involved in Parallel Proceedings;

(v) the sharing of information in order to reduce costs; and

(vi) the avoidance or minimization of litigation, costs and inconvenience to the parties[1] in Parallel Proceedings.

[1] The term "parties" when used in these Guidelines shall be interpreted broadly.

D. These Guidelines should be implemented in each jurisdiction in such manner as the jurisdiction deems fit.[2]

E. These Guidelines are not intended to be exhaustive and in each case consideration ought to be given to the special requirements in that case.

F. Courts should consider in all cases involving Parallel Proceedings whether and how to implement these Guidelines. Courts should encourage and where necessary direct, if they have the power to do so, the parties to make the necessary applications to the court to facilitate such implementation by a protocol or order derived from these Guidelines and encourage them to act so as to promote the objectives and aims of these Guidelines wherever possible.

ADOPTION AND INTERPRETATION

Guideline 1: In furtherance of paragraph F above, the courts should encourage administrators in Parallel Proceedings to cooperate in all aspects of the case, including the necessity of notifying the courts at the earliest practicable opportunity of issues present and potential that may (a) affect those proceedings and (b) benefit from communication and coordination between the courts. For the purpose of these Guidelines, "administrator" includes a liquidator, trustee, judicial manager, administrator in administration proceedings, debtor-in-possession in a reorganization or scheme of arrangement, or any fiduciary of the estate or person appointed by the court.

Guideline 2: Where a court intends to apply these Guidelines (whether in whole or in part and with or without modification) in particular Parallel Proceedings, it will need to do so by a protocol or an order[3], following an application by the parties or pursuant to a direction of the court if the court has the power to do so.

Guideline 3: Such protocol or order should promote the efficient and timely administration of Parallel Proceedings. It should address the coordination of requests for court approvals of

[2] Possible modalities for the implementation of these Guidelines include practice directions and commercial guides.

[3] In the normal case, the parties will agree on a protocol derived from these Guidelines and obtain the approval of each court in which the protocol is to apply.

related decisions and actions when required and communication with creditors and other parties. To the extent possible, it should also provide for timesaving procedures to avoid unnecessary and costly court hearings and other proceedings.

Guideline 4: These Guidelines when implemented are not intended to:

(i) interfere with or derogate from the jurisdiction or the exercise of jurisdiction by a court in any proceedings including its authority or supervision over an administrator in those proceedings;

(ii) interfere with or derogate from the rules or ethical principles by which an administrator is bound according to any applicable law and professional rules;

(iii) prevent a court from refusing to take an action that would be manifestly contrary to the public policy of the jurisdiction; or

(iv) confer or change jurisdiction, alter substantive rights, interfere with any function or duty arising out of any applicable law, or encroach upon any applicable law.

Guideline 5: For the avoidance of doubt, a protocol or order under these Guidelines is procedural in nature. It should not constitute a limitation on or waiver by the court of any powers, responsibilities, or authority or a substantive determination of any matter in controversy before the court or before the other court or a waiver by any of the parties of any of their substantive rights and claims.

Guideline 6: In the interpretation of these Guidelines or any protocol or order under these Guidelines, due regard shall be given to their international origin and to the need to promote good faith and uniformity in their application.

COMMUNICATION BETWEEN COURTS

Guideline 7: A court may receive communications from a foreign court and may respond directly to them. Such communications may occur for the purpose of the orderly making of submissions and rendering of decisions by the courts, and to coordinate and resolve any procedural, administrative or preliminary matters relating to any joint hearing where Annex A is applicable. Such

communications may take place through the following methods or such other method as may be agreed by the two courts in a specific case:

(i) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings or other documents directly to the other court and providing advance notice to counsel for affected parties in such manner as the court considers appropriate.

(ii) Directing counsel to transmit or deliver copies of documents, pleadings, affidavits, briefs or other documents that are filed or to be filed with the court to the other court in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the court considers appropriate.

(iii) Participating in two-way communications with the other court, in which case Guideline 8 should be considered.

Guideline 8: In the event of communications between courts, other than on procedural matters, unless otherwise directed by any court involved in the communications whether on an *ex parte* basis or otherwise, or permitted by a protocol, the following shall apply:

(i) In the normal case, parties may be present.

(ii) If the parties are entitled to be present, advance notice of the communications shall be given to all parties in accordance with the rules of procedure applicable in each of the courts to be involved in the communications and the communications between the courts shall be recorded and may be transcribed. A written transcript may be prepared from a recording of the communications that, with the approval of each court involved in the communications, may be treated as the official transcript of the communications.

(iii) Copies of any recording of the communications, of any transcript of the communications prepared pursuant to any direction of any court involved in the communications, and of any official transcript prepared from a recording may be filed as part of

the record in the proceedings and made available to the parties and subject to such directions as to confidentiality as any court may consider appropriate.

(iv) The time and place for communications between the courts shall be as directed by the courts. Personnel other than judges in each court may communicate with each other to establish appropriate arrangements for the communications without the presence of the parties.

Guideline 9: A court may direct that notice of its proceedings be given to parties in proceedings in another jurisdiction. All notices, applications, motions, and other materials served for purposes of the proceedings before the court may be ordered to be provided to such other parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the court in accordance with the procedures applicable in the court.

APPEARANCE IN COURT

Guideline 10: A court may authorize a party, or an appropriate person, to appear before and be heard by a foreign court, subject to approval of the foreign court to such appearance.

Guideline 11: If permitted by its law and otherwise appropriate, a court may authorize a party to a foreign proceeding, or an appropriate person, to appear and be heard on a specific matter by it without thereby becoming subject to its jurisdiction for any purpose other than the specific matter on which the party is appearing.

CONSEQUENTIAL PROVISIONS

Guideline 12: A court shall, except on proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in other jurisdictions without further proof. For the avoidance of doubt, such recognition and acceptance does not constitute recognition or acceptance of their legal effect or implications.

Guideline 13: A court shall, except upon proper objection on valid grounds and then only to the extent of such objection,

accept that orders made in the proceedings in other jurisdictions were duly and properly made or entered on their respective dates and accept that such orders require no further proof for purposes of the proceedings before it, subject to its law and all such proper reservations as in the opinion of the court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such orders. Notice of any amendments, modifications, extensions, or appellate decisions with respect to such orders shall be made to the other court(s) involved in Parallel Proceedings, as soon as it is practicable to do so.

Guideline 14: A protocol or order made by a court under these Guidelines is subject to such amendments, modifications, and extensions as may be considered appropriate by the court, and to reflect the changes and developments from time to time in any Parallel Proceedings. Notice of such amendments, modifications, or extensions shall be made to the other court(s) involved in Parallel Proceedings, as soon as it is practicable to do so.

ANNEX A (JOINT HEARINGS)

Annex A to these Guidelines relates to guidelines on the conduct of joint hearings. Annex A shall be applicable to, and shall form a part of these Guidelines, with respect to courts that may signify their assent to Annex A from time to time. Parties are encouraged to address the matters set out in Annex A in a protocol or order.

ANNEX A: JOINT HEARINGS

A court may conduct a joint hearing with another court. In connection with any such joint hearing, the following shall apply, or where relevant, be considered for inclusion in a protocol or order:

(i) The implementation of this Annex shall not divest nor diminish any court's respective independent jurisdiction over the subject matter of proceedings. By implementing this Annex, neither a court nor any party shall be deemed to have approved or engaged in any infringement on the sovereignty of the other jurisdiction.

(ii) Each court shall have sole and exclusive jurisdiction and power over the conduct of its own proceedings and the hearing and determination of matters arising in its proceedings.

(iii) Each court should be able simultaneously to hear the proceedings in the other court. Consideration should be given as to how to provide the best audio-visual access possible.

(iv) Consideration should be given to coordination of the process and format for submissions and evidence filed or to be filed in each court.

(v) A court may make an order permitting foreign counsel or any party in another jurisdiction to appear and be heard by it. If such an order is made, consideration needs to be given as to whether foreign counsel or any party would be submitting to the jurisdiction of the relevant court and/or its professional regulations.

(vi) A court should be entitled to communicate with the other court in advance of a joint hearing, with or without counsel being present, to establish the procedures for the orderly making of submissions and rendering of decisions by the courts, and to coordinate and resolve any procedural, administrative or preliminary matters relating to the joint hearing.

(vii) A court, subsequent to the joint hearing, should be entitled to communicate with the other court, with

or without counsel present, for the purpose of determining outstanding issues. Consideration should be given as to whether the issues include procedural and/or substantive matters. Consideration should also be given as to whether some or all of such communications should be recorded and preserved.

Exhibit A

Protocol

CROSSBORDER RESTRUCTURING PROTOCOL FOR ABITIBIBOWATER INC. AND ITS AFFILIATES

Between the United States Bankruptcy Court for the District of Delaware (Case No. 09-11296 (KJC) and the Superior Court of Québec (No. 500-11-036133-094)

This Crossborder insolvency protocol (the "Protocol") shall govern the conduct of all parties-in-interest in the Restructuring Proceedings (as defined below). The *Guidelines Applicable to Court-to-Court Communications in Crossborder Cases* (the "Guidelines"), attached as Exhibit A hereto, shall be incorporated by reference and form part of this Protocol. Where there is any discrepancy between the Protocol and the Guidelines, this Protocol shall prevail.

Background

1. AbitibiBowater Inc., a Delaware corporation ("AbitibiBowater"), is the ultimate parent company of a multinational enterprise that operates, through its various subsidiaries and affiliates, in the United States, Canada and other countries. AbitibiBowater and certain of its direct and indirect subsidiaries (collectively, the "Chapter 11 Debtors")[1] each commenced cases (the "Chapter 11 Cases") under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"), in the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") on April 16, 2009 (the "Petition Date"). Certain of the Chapter 11

[1] The Chapter 11 Debtors are: AbitibiBowater Inc., AbitibiBowater US Holding 1 Corp., AbitibiBowater US Holding LLC, AbitibiBowater Canada Inc., Abitibi-Consolidated Alabama Corporation, Abitibi-Consolidated Corporation, Abitibi-Consolidated Finance LP, Abitibi Consolidated Sales Corporation, Alabama River Newsprint Company, Augusta Woodlands, LLC, Bowater Alabama LLC, Bowater America Inc., Bowater Canada Finance Corporation, Bowater Canadian Forest Products Inc., Bowater Canadian Holdings Incorporated, Bowater Canadian Limited, Bowater Finance Company Inc., Bowater Finance II LLC, Bowater Incorporated, Bowater LaHave Corporation, Bowater Maritimes Inc., Bowater Newsprint South LLC, Bowater Newsprint South Operations LLC, Bowater Nuway Inc., Bowater Nuway Mid-States Inc., Bowater South American Holdings Incorporated, Bowater Ventures Inc., Catawba Property Holdings, LLC, Coosa Pines Golf Club Holdings LLC, Donohue Corp., Lake Superior Forest Products Inc. and Tenex Data Inc.

Debtors (the "Crossborder Debtors")[2] and certain subsidiaries of AbitibiBowater that did not file Chapter 11 Cases and that are not Chapter 11 Debtors (the "CCAA Debtors")[3] commenced a reorganization proceeding (the "Canadian Proceeding") by filing an application under the Canadian *Companies' Creditors Arrangement Act* (the "CCAA") with the Superior Court, Commercial Division, for the Judicial District of Montreal, Canada (the "Canadian Court") and an Order (as amended from time to time, the "CCAA Order") has been granted under which: (a) the CCAA Debtors and Crossborder Debtors have been determined to be entitled to relief under the CCAA; (b) Ernst & Young Inc. was appointed as monitor of the CCAA Debtors and Crossborder Debtors (in the CCAA Proceedings affecting them) and as information officer with respect to those U.S. Debtors that obtained relief under section 18.6 of the CCAA (in both capacities, the "Monitor"), with the rights, powers, duties and limitations upon liabilities set forth in the CCAA and in the CCAA Order; and (c) a stay of proceedings in respect of the CCAA Debtors and Crossborder Debtors has been granted.

2. All of the Chapter 11 Cases have been consolidated (for procedural purposes only) under Case No. 09-11296 (KJC). The Chapter 11 Debtors continue to operate their business and manage their properties as debtors-in-possession pursuant to Sections 1107

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[2] The Crossborder Debtors are: Bowater Canada Finance Corporation, Bowater Canadian Holdings Incorporated, AbitibiBowater Canada Inc., Bowater Canadian Forest Products Inc., Bowater Maritimes Inc., Bowater LaHave Corporation and Bowater Canadian Limited.

[3] The CCAA Debtors are: Bowater Mitis Inc., Bowater Guerette Inc., Bowater Couturier Inc., Alliance Forest Products (2001) Inc., Bowater Belledune Sawmill Inc., St. Maurice River Drive Company, Bowater Treated Wood Inc., Canexel Hardboard Inc., 9068-9050 Quebec Inc., Bowater Canada Treasury Corporation, Bowater Canada Finance Limited Partnership, Bowater Shelburne Corporation, 3231378 Nova Scotia, Bowater Pulp and Paper Canada Holdings Limited Partnership, Abitibi Consolidated Inc., Abitibi-Consolidated Company of Canada, Abitibi-Consolidated Nova Scotia Incorporated, 32117925 Nova Scotia Company, Terra-Nova Explorations Ltd., The Jonquiere Pulp Company, The International Bridge and Terminal Company, Scramble Mining Limited, 9150-3383 Quebec Inc., Star Lake Hydro Partnership, Saguenay Forest Products Inc., 3224112 Nova Scotia Limited, La Tuque Forest Products Inc., Marketing Donohue Inc., Abitibi-Consolidated Canadian Office Products Holdings Inc., 3834328 Canada Inc., 6169678 Canada Incorporated, 4042410 Canada Inc., Donohue Recycling and 1508756 Ontario Inc.

and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in the Chapter 11 Cases.

3. On April 28, 2009, the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed a statutory committee of unsecured creditors (the "Committee") in the Chapter 11 Cases.

4. For convenience: (a) AbitibiBowater and its direct and indirect U.S. subsidiaries who are Chapter 11 Debtors but that are not Crossborder Debtors shall be referred to as the "U.S. Debtors"[4]; (b) the CCAA Debtors, the U.S. Debtors, and the Crossborder Debtors shall be referred to herein collectively as the "Debtors"; (c) the Chapter 11 Cases and the Canadian Proceeding shall be referred to herein collectively as the "Restructuring Proceedings"; and (d) the U.S. Court and the Canadian Court shall be referred to herein collectively as the "Courts," and each individually as a "Court".[5]

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[4] The U.S. Debtors in these cases are: AbitibiBowater Inc., AbitibiBowater US Holding 1 Corp., AbitibiBowater US Holding LLC, Abitibi-Consolidated Alabama Corporation, Abitibi-Consolidated Corporation, Abitibi-Consolidated Finance LP, Abitibi Consolidated Sales Corporation, Alabama River Newsprint Company, Augusta Woodlands, LLC, Bowater Alabama LLC, Bowater America Inc., Bowater Finance Company Inc., Bowater Finance II LLC, Bowater Incorporated, Bowater Newsprint South LLC, Bowater Newsprint South Operations LLC, Bowater Nuway Inc., Bowater Nuway Mid-States Inc., Bowater South American Holdings Incorporated, Bowater Ventures Inc., Catawba Property Holdings, LLC, Coosa Pines Golf Club Holdings LLC, Donohue Corp., Lake Superior Forest Products Inc. and Tenex Data Inc.

[5] Two of the CCAA Debtors – Abitibi-Consolidated Inc. and Abitibi-Consolidated Company of Canada (together, the "Chapter 15 Debtors") have filed petitions for recognition under chapter 15 of the Bankruptcy Code (the "Chapter 15 Cases") in the U.S. Court. AbitibiBowater and certain of the U.S. Debtors also filed for ancillary relief in Canada seeking relief in support of the Chapter 11 Cases in Canada under section 18.6 of the CCAA. The U.S. Debtors who obtained section 18.6 relief are: AbitibiBowater Inc., AbitibiBowater US Holding 1 Corp., Bowater Ventures Inc., Bowater Incorporated, Bowater Nuway Inc., Bowater Nuway-Midstates, Inc., Catawba Property Holdings LLC, Bowater Finance Company Inc., Bowater South American Holdings Incorporated, Bowater America Inc., Lake Superior Forest Products Inc., Bowater Newsprint South LLC, Bowater Newsprint South Operations LLC, Bowater Finance II, LLC, Bowater Alabama LLC and Coosa Pines Golf Club Holdings LLC.

Purpose and Goals

5. While the Chapter 11 Cases and the Canadian Proceeding are separate proceedings pending in the United States and Canada, the implementation of administrative procedures is both necessary and desirable to coordinate certain activities therein, to protect the rights of parties thereto, to ensure the maintenance of the Courts' respective independent jurisdiction and to give due effect to any applicable doctrines, including, without limitation, comity. Accordingly, this Protocol has been developed to establish the following mutually desirable goals and objectives in the Restructuring Proceedings:

(a) harmonize and coordinate activities in the Restructuring Proceedings before the Courts;

(b) promote the orderly and efficient administration of the Restructuring Proceedings to, among other things, maximize the efficiency of the Restructuring Proceedings, reduce the costs associated therewith and avoid duplication of efforts;

(c) honor the independence and integrity of the Courts and other courts and tribunals of Canada and the United States;

(d) promote international cooperation and respect for comity among the Courts, the Debtors, the U.S. Representatives (defined below), the Canadian Representatives (defined below) (together with the U.S. Representatives, the "Estate Representatives"), the U.S. Trustee, and other creditors and interested parties in the Restructuring Proceedings;

(e) facilitate the fair, open, and efficient administration of the Restructuring Proceedings for the benefit of all of the Debtors' creditors and other stakeholders, wherever located; and

(f) implement a framework of general principles to address basic administrative issues arising out of the crossborder nature of the Restructuring Proceedings.

Comity and Independence of the Courts

6. The approval and implementation of this Protocol shall not divest or diminish the U.S. Court's and the Canadian Court's respective independent jurisdiction over the subject matter of the Chapter 11 Cases and Canadian Proceeding, respectively. By approving

and implementing this Protocol, the U.S. Court, the Canadian Court, the Debtors, the Estate Representatives, and any creditor or any other interested party shall not be deemed to have approved or engaged in any infringement on the sovereignty of the United States or Canada.

7. The U.S. Court shall have sole and exclusive jurisdiction and power over the conduct of the Chapter 11 Cases and the hearing and determination of matters arising in the Chapter 11 Cases. The Canadian Court shall have sole and exclusive jurisdiction and power over the conduct of the Canadian Proceeding and the hearing and determination of matters arising in the Canadian Proceeding.

8. In accordance with the principles of comity and independence recognized herein, nothing contained herein shall be construed to:

(a) increase, decrease or otherwise modify the independence, sovereignty or jurisdiction of the U.S. Court, the Canadian Court or any other court or tribunal in the United States or Canada, including the ability of any such court or tribunal to provide appropriate relief under applicable law on an *ex parte* or "limited notice" basis;

(b) require the U.S. Court to take any action that is inconsistent with its obligations under the laws of the United States;

(c) require the Canadian Court to take any action that is inconsistent with its obligations under the laws of Canada;

(d) require the Debtors, the Estate Representatives, or the U.S. Trustee to take any action or refrain from taking any action that would result in a breach of any duty imposed on them by any applicable law;

(e) authorize any action that requires the specific approval of one or both of the Courts under the Bankruptcy Code or the CCAA after appropriate notice and a hearing (except to the extent that such action specifically is described in this Protocol); or

(f) preclude the Debtors, the Estate Representatives, the U.S. Trustee, or any creditor or other interested party from asserting such party's substantive rights under the applicable laws of the United States, Canada, or any other relevant jurisdiction including, without limitation, the rights of interested parties to appeal from the decisions taken by one or both Courts.

9. The Debtors, the Estate Representatives, and their respective employees, members, agents and professionals shall respect and comply with the independent, nondelegable duties imposed upon them by the Bankruptcy Code, the CCAA, the CCAA Order and other applicable laws and court orders.

Cooperation

10. To assist in the efficient administration of the Restructuring Proceedings and recognizing that the U.S. Debtors, the CCAA Debtors, and the Crossborder Debtors may each be creditors of the others' estates, the Debtors and the respective Estate Representatives shall, where appropriate: (a) cooperate with each other in connection with actions taken in both the U.S. Court and the Canadian Court; and (b) take any other appropriate steps to coordinate the administration of the Restructuring Proceedings for the benefit of the Debtors' respective estates and stakeholders.

11. To harmonize and coordinate the administration of the Restructuring Proceedings, the U.S. Court and the Canadian Court may coordinate activities and consider whether it is appropriate to defer to the judgment of the other Court. In furtherance of the foregoing:

(a) The U.S. Court and the Canadian Court may communicate with one another, with or without counsel present, with respect to any procedural matter relating to the Restructuring Proceedings.

(b) If the issue of the proper jurisdiction or Court to determine an issue is raised by an interested party in either of the Restructuring Proceedings with respect to any relief sought in either Court, either Court may consult with the other Court to determine an appropriate process by which the issue of jurisdiction or proper Court will be determined. Such process shall be subject to submissions by the Debtors, the U.S. Trustee, the Estate Representatives, and any interested party prior to any determination on the issue of jurisdiction or proper Court being made by either Court..

(c) The Courts may, but are not obligated to, coordinate activities in the Restructuring Proceedings such that the subject matter of any particular

action, suit, request, application, contested matter or other proceeding is determined in a single Court.

(d) The U.S. Court and Canadian Court may conduct joint hearings (each, a "Joint Hearing") with respect to any matter relating to the conduct, administration, determination, or disposition of any aspect of the Chapter 11 Cases or the Canadian Proceeding if both Courts determine and agree that such Joint Hearings are necessary or advisable. With respect to any such Joint Hearings, unless otherwise ordered by both Courts, the following procedures shall apply:

(i) a telephone or video link shall be established so that each Court will be able to simultaneously hear the proceedings in the other Court;

(ii) notices, submissions, motions or applications by any party that are or become the subject of a Joint Hearing (collectively, the "Pleadings") shall be made or filed initially only with the Court in which such party is appearing and seeking relief. Promptly after the scheduling of any Joint Hearing, the party submitting such Pleadings to one Court will file courtesy copies with the other Court. In any event, Pleadings seeking relief from both Courts shall be filed with both Courts;

(iii) any party intending to rely on written evidentiary materials in support of a submission to the U.S. Court or the Canadian Court in connection with any Joint Hearing (collectively, "Evidentiary Materials") shall file or otherwise submit such Evidentiary Materials to both Courts in advance of the Joint Hearing. To the fullest extent possible, the Evidentiary Materials filed in each Court shall be identical and shall be consistent with the procedural and evidentiary rules and requirements of each Court;

(iv) if a party has not previously appeared in or otherwise acknowledged the jurisdiction of a Court, it shall be entitled to file Pleadings or Evidentiary Materials in connection with the Joint Hearing without, by the mere act of such filings, being deemed to have appeared in or acknowledged the jurisdiction of the Court in which such material is filed, so long as such party does not request any affirmative relief from such Court;

(v) the Judge of the U.S. Court and Justice of the Canadian Court who will preside over any Joint Hearing may communicate with each other in advance of such Joint Hearing, with or without counsel being present, to: (a) establish guidelines for the orderly submission of Pleadings, Evidentiary Materials and any other papers and for the rendering of decisions; and (b) address any related procedural, administrative or preliminary matters; and

(vi) the Judge of the U.S. Court and Justice of the Canadian Court who will preside over any Joint Hearing may communicate with each other during and after any Joint Hearing, with or without counsel being present, for the purposes of: (a) determining whether consistent rulings can be made by both Courts; (b) coordinating the terms of the Courts' respective rulings; and (c) addressing any related procedural or administrative matters.

12. Notwithstanding the terms of paragraph 11 above, this Protocol recognizes that the U.S. Court and Canadian Court are independent courts. Accordingly, although the Courts will seek to cooperate and coordinate with each other in good faith, each of the Courts shall be entitled at all times to exercise its independent jurisdiction and authority with respect to: (a) matters presented to and properly before such Court; and (b) the conduct of the parties appearing in such matters.

13. Where one Court has jurisdiction over a matter which requires the application of the law of the jurisdiction of the other Court to determine an issue before it, the Court with jurisdiction over such matter may, among other things, hear expert evidence or seek the advice and direction of the other Court in respect of the foreign law to be applied, which advice will be made available to all parties in interest.

Recognition of Stays of Proceedings

14. The Canadian Court hereby recognizes the validity of the stay of proceedings and actions against or respecting the Debtors and their property under section 362 of the Bankruptcy Code (the "U.S. Stay"). In implementing the terms of this paragraph, the Canadian Court may consult with the U.S. Court regarding: (a) the interpretation, extent, scope and applicability of the U.S. Stay and any orders of the U.S. Court modifying or granting relief from the U.S. Stay; and (ii) the enforcement of the U.S. Stay in Canada.

15. The U.S. Court hereby recognizes the validity of the CCAA Order and the stay of proceedings and actions against or respecting the Debtors and their property under the CCAA and CCAA Order (the "Canadian Stay"). In implementing the terms of this paragraph, the U.S. Court may consult with the Canadian Court regarding: (a) the interpretation, extent, scope and applicability of the Canadian Stay and any orders of the Canadian Court modifying or granting relief from the Canadian Stay; and (b) the enforcement of the Canadian Stay in the United States.

16. Nothing contained herein shall affect or limit the Debtors' or other parties' rights to assert the applicability or nonapplicability of the U.S. Stay or the Canadian Stay to any particular proceeding, property, asset, activity or other matter, wherever pending or located; provided, however, that the Canadian Stay shall not prevent the Committee from taking any actions or engaging in any conduct in the Chapter 11 Cases.

Rights to Appear and Be Heard

17. Each of the Debtors, their creditors, the Estate Representatives, the U.S. Trustee and other interested parties in the Restructuring Proceedings, shall have the right and standing to:

(a) Appear and be heard in either the U.S. Court or the Canadian Court in the Restructuring Proceedings to the same extent as a creditor and other interested party domiciled in the forum country, subject to any local rules or regulations generally applicable to all parties appearing in the forum;

(b) File notices of appearance or other papers with the Clerk of the U.S. Court or the Canadian Court in the Restructuring Proceedings; provided, however, that any appearance or filing may subject a creditor or interested party to the jurisdiction of the Court in which the appearance or filing occurs; provided further, however, that the appearance by the Committee or the U.S. Trustee in the Canadian Proceeding, or the Monitor in the Chapter 11 Cases, shall not form a basis for personal jurisdiction over the members of the Committee, or the Monitor Parties (as defined below) in their individual capacity, by the Canadian Court and U.S. Court

respectively. Notwithstanding the foregoing, and in accordance with the policies set forth above:

(i) the Canadian Court shall have jurisdiction over the U.S. Representatives and the U.S. Trustee solely with respect to the particular matters as to which the U.S. Representatives or the U.S. Trustee appear before the Canadian Court; and

(ii) the U.S. Court shall have jurisdiction over the Canadian Representatives solely with respect to the particular matters as to which the Canadian Representatives appear before the U.S. Court.

Retention and Compensation of Representatives and Professionals

18. The Monitor and its respective officers, directors, employees, counsel, and agents, wherever located (collectively, the "Monitor Parties"), and any other estate representatives appointed in the Canadian Proceedings (collectively, with the Monitor Parties, the "Canadian Representatives") shall (subject to paragraph 17) be subject to the sole and exclusive jurisdiction of the Canadian Court with respect to all matters including: (a) the Canadian Representatives' appointment and tenure in office; (b) the retention, compensation and reimbursement of out-of-pocket costs of the Canadian Representatives; (c) the Canadian Representatives' liability, if any, to any person or entity, including the Debtors and any third parties, in connection with the Restructuring Proceedings; and (d) the hearing and determination of any other matters relating to the Canadian Representatives arising in the Canadian Proceedings under the CCAA or other applicable Canadian law. The Canadian Representatives, their counsel and any other professionals retained therefor (in all cases, whether Canadian or U.S.): (x) shall not be required to seek approval of their retention in the U.S. Court; (y) shall be compensated for their services solely in accordance with the CCAA, the CCAA Order and other applicable laws of Canada or orders of the Canadian Court; and (z) shall not be required to seek approval of their compensation in the U.S. Court.

19. The Monitor Parties shall be entitled to the same protections and immunities in the United States as those granted to them under the CCAA and the CCAA Order. In particular, except as otherwise provided in any subsequent order entered in the Canadian Proceedings, the Monitor Parties shall incur no liability or obligations as a result of the CCAA Order, the appointment of the Monitor, the carrying out of its duties or the provisions of the CCAA and the CCAA Order by the Monitor Parties, except any such liability arising from actions of the Monitor Parties constituting gross negligence or willful misconduct.

20. Any estate representatives appointed in the Chapter 11 Cases, including the Committee and, without limitation, any examiners or trustees appointed in accordance with section 1104 of the Bankruptcy Code (collectively, the "U.S. Representatives"), shall (subject to paragraph 17) be subject to the sole and exclusive jurisdiction of the U.S. Court with respect to all matters, including: (a) the U.S. Representatives' appointment and tenure in office; (b) the retention, compensation and reimbursement of out-of-pocket costs of the U.S. Representatives; (c) the U.S. Representatives' liability, if any, to any person or entity, including the Debtors and any third parties, in connection with the Restructuring Proceedings; and (d) the hearing and determination of any other matters relating to the U.S. Representatives arising in the Chapter 11 Cases under the Bankruptcy Code or other applicable laws of the United States. The U.S. Representatives, their counsel and any other professionals retained therefor (in all cases, whether Canadian or U.S.): (x) shall not be required to seek approval of their retention in the Canadian Court; (y) shall be compensated for their services solely in accordance with the Bankruptcy Code and other applicable laws of the United States or orders of the U.S. Court; and (z) shall not be required to seek approval of their compensation in the Canadian Court.

21. Subject to paragraphs 17 and 18, any Canadian professionals retained by any CCAA Debtors or Crossborder Debtors solely for activities performed in Canada or in connection with the CCAA Proceedings, including, in each case, without limitation, counsel, financial advisors, accountants, consultants and experts (collectively, the "Canadian Professionals") shall be subject to the sole and exclusive jurisdiction of the Canadian Court. Accordingly, the Canadian Professionals: (a) shall be subject to the procedures and standards for the retention and compensation applicable in the Canadian Court under the CCAA, the CCAA Order and any other applicable Canadian law or orders of the Canadian Court; and (b) shall not be required to seek approval of their retention or compensation in the U.S. Court.

22. Subject to paragraph 17, any United States professionals retained by any of the U.S. Debtors or Crossborder Debtors solely for activities performed in the United States or in connection with the Chapter 11 Cases, including in each case, without limitation, counsel, financial advisors, accountants, consultants and experts (collectively, the "U.S. Professionals") shall be subject to the sole and exclusive jurisdiction of the U.S. Court. Accordingly, the U.S. Professionals: (a) shall be subject to the procedures and standards for retention and compensation applicable in the U.S. Court under the Bankruptcy Code and any other applicable laws of the United States or orders of the U.S. Court; and (b) shall not be required to seek approval of their retention or compensation in the Canadian Court.

Notice

23. Notice of any Pleading or paper filed in one or both of the Restructuring Proceedings involving or related to matters addressed by this Protocol and notice of any related hearings or other proceedings shall be given by appropriate means (including, where circumstances warrant and if permitted by the applicable Court, by courier, facsimile and email)

to the following: (a) all creditors and other interested parties, in accordance with the practice of the jurisdiction where the papers are filed or the proceedings are to occur; and (b) to the extent not otherwise entitled to receive notice under clause (a) of this paragraph, to counsel for (i) the Debtors, (ii) the Monitor, (iii) the U.S. Trustee, (iv) the Committee, (v) the agent under any debtor-in-possession financing facility approved by the Courts, (vi) the agent under the securitization facility; (vii) the agents for the Debtors' prepetition credit agreements; and (viii) such other parties as may be designated by either of the Courts from time to time. Notice in accordance with this paragraph shall be given by the party otherwise responsible for effecting notice in the jurisdiction where the underlying papers are filed or the proceedings are to occur. In addition to the foregoing, upon request by either Court, the Monitor in the Canadian Proceedings and the Debtors in the Chapter 11 Cases shall provide to the U.S. Court or the Canadian Court, as the case may be, copies of all or any orders, decisions, opinions or similar papers issued by the other Court in the Restructuring Proceedings.

Effectiveness; Modification

24. This Protocol shall become effective only upon its approval by both the U.S. Court and the Canadian Court.

25. This Protocol may not be supplemented, modified, terminated or replaced in any manner except upon the approval of both the U.S. Court and the Canadian Court after notice and a hearing. Notice of any legal proceeding to supplement, modify, terminate or replace this Protocol shall be given in accordance with paragraph 23 above.

26. Notwithstanding anything to the contrary contained herein, nothing in this Protocol shall, or shall be deemed to, abrogate the requirements of Interim Rule 5012 (Communication of and Cooperation with Foreign Courts and Foreign Representatives) of the

Federal Rules of Bankruptcy Procedure, which remain effective in the District of Delaware as provided in the General Order dated November 24, 2008 of the United States Bankruptcy Court for the District of Delaware.

Procedure for Resolving Disputes under the Protocol

27. Disputes relating to the terms, intent or application of this Protocol may be addressed by interested parties to either the U.S. Court, the Canadian Court or both Courts upon notice in accordance with paragraph 23 above. In rendering a determination in any such dispute, the Court to which the issue is addressed: (a) shall consult with the other Court; and (b) may, in its sole and exclusive discretion, either: (i) render a binding decision after such consultation, (ii) defer to the determination of the other Court by transferring the matter, in whole or in part, to such other Court, or (iii) seek a Joint Hearing of both Courts in accordance with paragraph 11. Notwithstanding the foregoing, in making a determination under this paragraph, each Court shall give due consideration to the independence, comity and inherent jurisdiction of the other Court established under existing law.

28. In implementing the terms of the Protocol, the U.S. Court and the Canadian Court may, in their sole, respective discretion, provide advice or guidance to each other with respect to legal issues in accordance with the following procedures:

(a) the U.S. Court or the Canadian Court, as applicable, may determine that such advice or guidance is appropriate under the circumstances;

(b) the Court issuing such advice or guidance shall provide it to the other Court in writing;

(c) copies of such written advice or guidance shall be served by the applicable Court in accordance with paragraph 23 above; and

(d) the Courts may jointly decide to invite the Debtors, the Committee, the Estate Representatives, the U.S. Trustee, the Monitor and any other affected or interested party to make submissions to the appropriate Court in response to or in connection with any written advice or guidance received from the other Court.

29. For clarity, the provisions of paragraph 28 shall not be construed to restrict the ability of the U.S. Court and Canadian Court to confer as provided in paragraph 11 above whenever they deem it appropriate to do so.

Preservation of Rights

30. Except as specifically provided herein, neither the terms of this Protocol nor any actions taken under this Protocol shall: (a) prejudice or affect the powers, rights, claims and defenses of the Debtors and their respective estates, the Estate Representatives, the U.S. Trustee, or any of the Debtors' creditors under applicable law, including, without limitation, the Bankruptcy Code, the CCAA and the orders of the Courts; or (b) preclude or prejudice the rights of any person to assert or pursue such person's substantive rights against any other person under the applicable laws of Canada or the United States.

Exhibit A

Guidelines Applicable to Court-to-Court Communications in Crossborder Cases

THE AMERICAN LAW INSTITUTE

in association with

THE INTERNATIONAL INSOLVENCY INSTITUTE

Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases

As Adopted and Promulgated in Transnational Insolvency: Principles of Cooperation Among the NAFTA Countries

BY

THE AMERICAN LAW INSTITUTE
At Washington, D.C., May 16, 2000

And as Adopted by

THE INTERNATIONAL INSOLVENCY INSTITUTE
At New York, June 10, 2001

The American Law Institute
4025 Chestnut Street
Philadelphia, Pennsylvania 19104-3099
Telephone: (215) 243-1600
Telecopier: (215) 243-1636
E-mail: ali@ali.org
Website: http://www.ali.org

The International Insolvency Institute
Scotia Plaza, Suite 2100
40 King Street West
Toronto, Ontario M5H 3C2
Telephone: (416) 869-5757
Telecopier: (416) 360-8877
E-mail: info@iiiglobal.org
Website: http://www.iiiglobal.org

THE AMERICAN LAW INSTITUTE

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Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases

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THE AMERICAN LAW INSTITUTE
At Washington, D.C., May 16, 2000

And as Adopted by

THE INTERNATIONAL INSOLVENCY INSTITUTE
At New York, June 10, 2001

The *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases* were developed by The American Law Institute during and as part of its Transnational Insolvency Project and the use of the *Guidelines* in cross-border cases is specifically permitted and encouraged.

The text of the *Guidelines* is available in English and several other languages including Chinese, French, German, Italian, Japanese, Korean, Portuguese, Russian, Swedish, and Spanish on the website of the International Insolvency Institute at http://www.iiiglobal.org/international/guidelines.html.

The American Law Institute
4025 Chestnut Street
Philadelphia, Pennsylvania 19104-3099
Telephone: (215) 243-1600
Telecopier: (215) 243-1636
E-mail: ali@ali.org
Website: http://www.ali.org

The International Insolvency Institute
Scotia Plaza, Suite 2100
40 King Street West
Toronto, Ontario M5H 3C2
Telephone: (416) 869-5757
Telecopier: (416) 360-8877
E-mail: info@iiiglobal.org
Website: http://www.iiiglobal.org

Foreword by the Director of The American Law Institute

In May of 2000 The American Law Institute gave its final approval to the work of the ALI's Transnational Insolvency Project. This consisted of the four volumes eventually published, after a period of delay required by the need to take into account a newly enacted Mexican Bankruptcy Code, in 2003 under the title of *Transnational Insolvency: Cooperation Among the NAFTA Countries*. These volumes included both the first phase of the project, separate Statements of the bankruptcy laws of Canada, Mexico, and the United States, and the project's culminating phase, a volume comprising *Principles of Cooperation Among the NAFTA Countries*. All reflected the joint input of teams of Reporters and Advisers from each of the three NAFTA countries and a fully transnational perspective. Published by Juris Publishing, Inc., they can be ordered on the ALI website (www.ali.org).

A byproduct of our work on the Principles volume, these *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases* appeared originally as Appendix B of that volume and were approved by the ALI in 2000 along with the rest of the volume. But the *Guidelines* have played a vital and influential role apart from the *Principles*, having been widely translated and distributed, cited and applied by courts, and independently approved by both the International Insolvency Institute and the Insolvency Institute of Canada. Although they were initially developed in the context of a project arrived at improving cooperation among bankruptcy courts within the NAFTA countries, their acceptance by the III, whose members include leaders

of the insolvency bar from more than 40 countries, suggests a pertinence and applicability that extends far beyond the ambit of NAFTA. Indeed, there appears to be no reason to restrict the *Guidelines* to insolvency cases; they should prove useful whenever sensible and coherent standards for cooperation among courts involved in overlapping litigation are called for. See, e.g., American Law Institute, International Jurisdiction and Judgments Project § 12(e) (Tentative Draft No. 2, 2004).

The American Law Institute expresses its gratitude to the International Insolvency Institute for its continuing efforts to publicize the *Guidelines* and to make them more widely known to judges and lawyers around the world; to III Chair E. Bruce Leonard of Toronto, who as Canadian Co-Reporter for the Transnational Insolvency Project was the principal drafter of the Guidelines in English and has been primarily responsible for arranging and overseeing their translation into the various other languages in which they now appear; and to the translators themselves, whose work will make the *Guidelines* much more universally accessible. We hope that this greater availability, in these new English and bilingual editions, will help to foster better communication, and thus better understanding, among the diverse courts and legal systems throughout our increasingly globalized world.

LANCE LIEBMAN
Director
The American Law Institute

January 2004

Foreword by the Chair of the International Insolvency Institute

The International Insolvency Institute, a world-wide association of leading insolvency professionals, judges, academics, and regulators, is pleased to recommend the adoption and the application in cross-border and multinational cases of The American Law Institute's *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases*. The *Guidelines* were reviewed and studied by a Committee of the III and were unanimously approved by its membership at the III's Annual General Meeting and Conference in New York in June 2001.

Since their approval by the III, the *Guidelines* have been applied in several cross-border cases with considerable success in achieving the coordination that is so necessary to preserve values for all of the creditors that are involved in international cases. The III recommends without qualification that insolvency professionals and judges adopt the *Guidelines* at the earliest possible stage of a cross-border case so that they will be in place whenever there is a need for the courts involved to communicate with each other, e.g., whenever the actions of one court could impact on issues that are before the other court.

Although the *Guidelines* were developed in an insolvency context, it has been noted by litigation professionals and judges that the *Guidelines* would be equally valuable and constructive in any international case where two or more courts are involved. In fact, in multijurisdictional litigation, the positive effect of the *Guidelines* would be even greater in cases where several courts are involved. It

is important to appreciate that the *Guidelines* require that all domestic practices and procedures be complied with and that the *Guidelines* do not alter or affect the substantive rights of the parties or give any advantage to any party over any other party.

The International Insolvency Institute expresses appreciation to its members who have arranged for the translation of the *Guidelines* into French, German, Italian, Korean, Japanese, Chinese, Portuguese, Russian, and Swedish and extends its appreciation to The American Law Institute for the translation into Spanish. The III also expresses its appreciation to The American Law Institute, the American College of Bankruptcy, and the Ontario Superior Court of Justice Commercial List Committee for their kind and generous financial support in enabling the publication and dissemination of the *Guidelines* in bilingual versions in major countries around the world.

Readers who become aware of cases in which the *Guidelines* have been applied are highly encouraged to provide the details of those cases to the III (fax: 416-360-8877; e-mail: *info@iiiglobal.org*) so that everyone can benefit from the experience and positive results that flow from the adoption and application of the *Guidelines*. The continuing progress of the *Guidelines* and the cases in which the *Guidelines* have been applied will be maintained on the III's website at *www.iiiglobal.org*.

The III and all of its members are very pleased to have been a part of the development and success of the *Guidelines* and commend The American Law Institute for its vision in developing the *Guidelines* and in supporting

their worldwide circulation to insolvency professionals, judges, academics, and regulators. The use of the *Guidelines* in international cases will change international insolvencies and reorganizations for the better forever, and the insolvency community owes a considerable debt to The American Law Institute for the inspiration and vision that has made this possible.

E. BRUCE LEONARD
Chairman
The International Insolvency Institute

Toronto, Ontario
March 2004

Judicial Preface

We believe that the advantages of co-operation and co-ordination between Courts is clearly advantageous to all of the stakeholders who are involved in insolvency and reorganization cases that extend beyond the boundaries of one country. The benefit of communications between Courts in international proceedings has been recognized by the United Nations through the *Model Law on Cross-Border Insolvency* developed by the United Nations Commission on International Trade Law and approved by the General Assembly of the United Nations in 1997. The advantages of communications have also been recognized in the European Union Regulation on Insolvency Proceedings which became effective for the Member States of the European Union in 2002.

The *Guidelines for Court-to-Court Communications in Cross-Border Cases* were developed in the American Law Institute's Transnational Insolvency Project involving the NAFTA countries of Mexico, the United States and Canada. The *Guidelines* have been approved by the membership of the ALI and by the International Insolvency Institute whose membership covers over 40 countries from around the world. We appreciate that every country is unique and distinctive and that every country has its own proud legal traditions and concepts. The *Guidelines* are not intended to alter or change the domestic rules or procedures that are applicable in any country and are not intended to affect or curtail the substantive rights of any party in proceedings before the Courts. The *Guidelines* are intended to encourage and facilitate co-operation in international cases while observing all applicable rules and procedures of the Courts that are respectively involved.

The *Guidelines* may be modified to meet either the procedural law of the jurisdiction in question or the particular circumstances in individual cases so as to achieve the greatest level of co-operation possible between the Courts in dealing with a multinational insolvency or liquidation. The *Guidelines,* however, are not restricted to insolvency cases and may be of assistance in dealing with non-insolvency cases that involve more than one country. Several of us have already used the *Guidelines* in cross-border cases and would encourage stakeholders and counsel in international cases to consider the advantages that could be achieved in their cases from the application and implementation of the *Guidelines.*

Mr. Justice David Baragwanath
High Court of New Zealand
Auckland, New Zealand

Chief Justice Donald I. Brenner
Supreme Court of British Columbia
Vancouver

Hon. Sidney B. Brooks
United States Bankruptcy Court
District of Colorado
Denver

Hon. Charles G. Case, II
United States Bankruptcy Court
District of Arizona
Phoenix

Mr. Justice Miodrag Dordević
Supreme Court of Slovenia
Ljubljana

Mr. Justice J.M. Farley
Ontario Superior Court of Justice
Toronto

Hon. James L. Garrity, Jr.
United States Bankruptcy Court
Southern District of New York (Ret'd)
Shearman & Sterling
New York

Hon. Allan L. Gropper
Southern District of New York
United States Bankruptcy Court
New York

Mr. Justice Paul R. Heath
High Court of New Zealand
Auckland, New Zealand

Hon. Hyungdu Kim
Supreme Court of Korea
Seoul

Chief Judge Burton R. Lifland
United States Bankruptcy Appellate
Panel for the Second Circuit
New York

Mr. Justice Gavin Lightman
Royal Courts of Justice
London

Hon. George Paine II
United States Bankruptcy Court
District of Tennessee
Nashville

Hon. Chiyong Rim
District Court
Western District of Seoul
Seoul, Korea

Mr. Justice Adolfo A.N. Rouillon
Court of Appeal
Rosario, Argentina

Hon. Shinjiro Takagi
Supreme Court of Japan (Ret'd)
Industrial Revitalization Corporation of Japan
Tokyo

Mr. Justice Wisit Wisitsora – At
Business Reorganization Office
Government of Thailand
Bangkok

Mr. Justice R.H. Zulman
Supreme Court of Appeal of South Africa
Parklands

Guidelines
Applicable to Court-to-Court Communications in Cross-Border Cases

Introduction:

One of the most essential elements of cooperation in cross-border cases is communication among the administrating authorities of the countries involved. Because of the importance of the courts in insolvency and reorganization proceedings, it is even more essential that the supervising courts be able to coordinate their activities to assure the maximum available benefit for the stakeholders of financially troubled enterprises.

These Guidelines are intended to enhance coordination and harmonization of insolvency proceedings that involve more than one country through communications among the jurisdictions involved. Communications by judges directly with judges or administrators in a foreign country, however, raise issues of credibility and proper procedures. The context alone is likely to create concern in litigants unless the process is transparent and clearly fair. Thus, communication among courts in cross-border cases is both more important and more sensitive than in domestic cases. These Guidelines encourage such communications while channeling them through transparent procedures. The Guidelines are meant to permit rapid cooperation in a developing insolvency case while ensuring due process to all concerned.

A Court intending to employ the Guidelines — in whole or part, with or without modifications — should adopt them formally before applying them. A Court may wish to make its adoption of the Guidelines contingent upon, or temporary until, their adoption by other courts concerned in the matter. The adopting

Court may want to make adoption or continuance conditional upon adoption of the Guidelines by the other Court in a substantially similar form, to ensure that judges, counsel, and parties are not subject to different standards of conduct.

The Guidelines should be adopted following such notice to the parties and counsel as would be given under local procedures with regard to any important procedural decision under similar circumstances. If communication with other courts is urgently needed, the local procedures, including notice requirements, that are used in urgent or emergency situations should be employed, including, if appropriate, an initial period of effectiveness, followed by further consideration of the Guidelines at a later time. Questions about the parties entitled to such notice (for example, all parties or representative parties or representative counsel) and the nature of the court's consideration of any objections (for example, with or without a hearing) are governed by the Rules of Procedure in each jurisdiction and are not addressed in the Guidelines.

The Guidelines are not meant to be static, but are meant to be adapted and modified to fit the circumstances of individual cases and to change and evolve as the international insolvency community gains experience from working with them. They are to apply only in a manner that is consistent with local procedures and local ethical requirements. They do not address the details of notice and procedure that depend upon the law and practice in each jurisdiction. However, the Guidelines represent approaches that are likely to be highly useful in achieving efficient and just resolutions of cross-border insolvency issues. Their use, with such modifications and under such circumstances as may be appropriate in a particular case, is therefore recommended.

Guideline 1

Except in circumstances of urgency, prior to a communication with another Court, the Court should be satisfied that such a communication is consistent with all applicable Rules of Procedure in its country. Where a Court intends to apply these Guidelines (in whole or in part and with or without modifications), the Guidelines to be employed should, wherever possible, be formally adopted before they are applied. Coordination of Guidelines between courts is desirable and officials of both courts may communicate in accordance with Guideline 8(d) with regard to the application and implementation of the Guidelines.

Guideline 2

A Court may communicate with another Court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonizing proceedings before it with those in the other jurisdiction.

Guideline 3

A Court may communicate with an Insolvency Administrator in another jurisdiction or an authorized Representative of the Court in that jurisdiction in connection with the coordination and harmonization of the proceedings before it with the proceedings in the other jurisdiction.

Guideline 4

A Court may permit a duly authorized Insolvency Administrator to communicate with a foreign Court directly, subject to the approval of the foreign Court, or through an Insolvency Administrator in the other jurisdiction or through an autho-

rized Representative of the foreign Court on such terms as the Court considers appropriate.

Guideline 5

A Court may receive communications from a foreign Court or from an authorized Representative of the foreign Court or from a foreign Insolvency Administrator and should respond directly if the communication is from a foreign Court (subject to Guideline 7 in the case of two-way communications) and may respond directly or through an authorized Representative of the Court or through a duly authorized Insolvency Administrator if the communication is from a foreign Insolvency Administrator, subject to local rules concerning ex parte communications.

Guideline 6

Communications from a Court to another Court may take place by or through the Court:

(a) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings, or other documents directly to the other Court and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;

(b) Directing counsel or a foreign or domestic Insolvency Administrator to transmit or deliver copies of documents, pleadings, affidavits, factums, briefs, or other documents that are filed or to be filed with the Court to the other Court in such fashion as may be appropriate and providing advance notice to counsel for affect-

ed parties in such manner as the Court considers appropriate;

(c) Participating in two-way communications with the other Court by telephone or video conference call or other electronic means, in which case Guideline 7 should apply.

Guideline 7

In the event of communications between the Courts in accordance with Guidelines 2 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by either of the two Courts:

(a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;

(b) The communication between the Courts should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of both Courts, should be treated as an official transcript of the communication;

(c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of either Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to counsel for all parties in both

Courts subject to such Directions as to confidentiality as the Courts may consider appropriate; and

(d) The time and place for communications between the Courts should be to the satisfaction of both Courts. Personnel other than Judges in each Court may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by either of the Courts.

Guideline 8

In the event of communications between the Court and an authorized Representative of the foreign Court or a foreign Insolvency Administrator in accordance with Guidelines 3 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by the Court:

(a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;

(b) The communication should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of the Court, can be treated as an official transcript of the communication;

(c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of the Court, and of any official tran-

script prepared from a recording should be filed as part of the record in the proceedings and made available to the other Court and to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Court may consider appropriate; and

(d) The time and place for the communication should be to the satisfaction of the Court. Personnel of the Court other than Judges may communicate fully with the authorized Representative of the foreign Court or the foreign Insolvency Administrator to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by the Court.

Guideline 9

A Court may conduct a joint hearing with another Court. In connection with any such joint hearing, the following should apply, unless otherwise ordered or unless otherwise provided in any previously approved Protocol applicable to such joint hearing:

(a) Each Court should be able to simultaneously hear the proceedings in the other Court.

(b) Evidentiary or written materials filed or to be filed in one Court should, in accordance with the Directions of that Court, be transmitted to the other Court or made available electronically in a publicly accessible system in advance of the hearing. Transmittal of such material to the other Court or its public availability in an electronic system should not subject the party filing the material in one Court to the jurisdiction of the other Court.

(c) Submissions or applications by the representative of any party should be made only to the Court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other Court to make submissions to it.

(d) Subject to Guideline 7(b), the Court should be entitled to communicate with the other Court in advance of a joint hearing, with or without counsel being present, to establish Guidelines for the orderly making of submissions and rendering of decisions by the Courts, and to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing.

(e) Subject to Guideline 7(b), the Court, subsequent to the joint hearing, should be entitled to communicate with the other Court, with or without counsel present, for the purpose of determining whether coordinated orders could be made by both Courts and to coordinate and resolve any procedural or nonsubstantive matters relating to the joint hearing.

Guideline 10

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in the other jurisdiction without the need for further proof or exemplification thereof.

Guideline 11

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, accept that Orders made in the proceedings in the other jurisdiction were duly and properly made or entered on or about their respective dates and accept that such Orders require no further proof or exemplification for purposes of the proceedings before it, subject to all such proper reservations as in the opinion of the Court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such Orders.

Guideline 12

The Court may coordinate proceedings before it with proceedings in another jurisdiction by establishing a Service List that may include parties that are entitled to receive notice of proceedings before the Court in the other jurisdiction ("Non-Resident Parties"). All notices, applications, motions, and other materials served for purposes of the proceedings before the Court may be ordered to also be provided to or served on the Non-Resident Parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the Court in accordance with the procedures applicable in the Court.

Guideline 13

The Court may issue an Order or issue Directions permitting the foreign Insolvency Administrator or a representative of creditors in the proceedings in the other jurisdiction or an authorized

Representative of the Court in the other jurisdiction to appear and be heard by the Court without thereby becoming subject to the jurisdiction of the Court.

Guideline 14

The Court may direct that any stay of proceedings affecting the parties before it shall, subject to further order of the Court, not apply to applications or motions brought by such parties before the other Court or that relief be granted to permit such parties to bring such applications or motions before the other Court on such terms and conditions as it considers appropriate. Court-to-Court communications in accordance with Guidelines 6 and 7 hereof may take place if an application or motion brought before the Court affects or might affect issues or proceedings in the Court in the other jurisdiction.

Guideline 15

A Court may communicate with a Court in another jurisdiction or with an authorized Representative of such Court in the manner prescribed by these Guidelines for purposes of coordinating and harmonizing proceedings before it with proceedings in the other jurisdiction regardless of the form of the proceedings before it or before the other Court wherever there is commonality among the issues and/or the parties in the proceedings. The Court should, absent compelling reasons to the contrary, so communicate with the Court in the other jurisdiction where the interests of justice so require.

Guideline 16

Directions issued by the Court under these Guidelines are subject to such amendments, modifications, and extensions as

may be considered appropriate by the Court for the purposes described above and to reflect the changes and developments from time to time in the proceedings before it and before the other Court. Any Directions may be supplemented, modified, and restated from time to time and such modifications, amendments, and restatements should become effective upon being accepted by both Courts. If either Court intends to supplement, change, or abrogate Directions issued under these Guidelines in the absence of joint approval by both Courts, the Court should give the other Courts involved reasonable notice of its intention to do so.

Guideline 17

Arrangements contemplated under these Guidelines do not constitute a compromise or waiver by the Court of any powers, responsibilities, or authority and do not constitute a substantive determination of any matter in controversy before the Court or before the other Court nor a waiver by any of the parties of any of their substantive rights and claims or a diminution of the effect of any of the Orders made by the Court or the other Court.

February 6

February 27
February 20
February 13
February 6

Singapore-Delaware Courts Adopt Cross-Border Insolvency Guidelines

Collecting payments across borders can be challenging enough. If problems escalate to a cross-border insolvency, the road gets even bumpier. The Singapore Supreme Court and U.S. Bankruptcy Court for the District of Delaware adopted on Feb. 1 guidelines they say will cut costs and improve the process for proceedings.

“These guidelines are an effort for improved coordination among courts,” said attorney Bruce Nathan, a partner with New York-based Lowenstein Sandler LLP. “This is good news for trade and other creditors who are involved in international insolvencies. These guidelines ensure that courts will not be making inconsistent decisions.”

The guidelines are “a net positive and should hopefully lead to less confusion as U.S. and foreign courts try to work toward the goal of maximizing recoveries for all creditors,” Nathan explained. They are not unique, however. “We’ve done this before with Canada, and it has been very successful,” he added. Nathan and his colleague Philip Gross will include a discussion about these types of guidelines as part of a free FCIB members-only webinar, *Chapter 15: Demystifying the Bankruptcy Code and Other Cross Border Insolvency Issues*, 11 AM ET, on Thursday, March 2.

Other countries, including Australia, England and Wales, are expected to follow suit, according to *The Straits Times*. “The guidelines released by the Supreme Court yesterday were first worked on during the [inaugural Judicial Insolvency Network meeting initiated by Singapore last October] and provide a roadmap for how courts communicate.”

According to the article, the guidelines promote the following:

- Parties notify courts if the case would benefit from cross-court coordination; courts encourage parties to consider guidelines.
- Where appropriate, a protocol or court order is issued following parties' application or at court's own motion.
- Court order may include means or circumstances in which courts

coordinate or communicate. For example, courts may communicate directly or send documents such as judgments or transcripts of proceedings to each other or direct counsel to send pleadings to courts concerned.

- Courts may also conduct joint hearings so that two or more courts may simultaneously record evidence and hear arguments, but each court retains independence and impartiality.

In 2012, nonbinding guidelines were developed by the American Law Institute and the International Insolvency Institute and for cross-border insolvency cases in the European Union in 2015, pointed out professor Bob Wessels, of the University of Leiden, The Netherlands, co-drafter of the American and European examples. These types of guidelines reduce legal costs for stakeholders and help preserve the value of financially distressed businesses, he added. “It’s spectacular that courts themselves have taken this initiative.”

Lowenstein Sandler

Bruce S. Nathan
Partner

New York
Tel: 212.204.8686 Fax: 973.422.6851
Email: bnathan@lowenstein.com

Practice

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

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

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

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

Education

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

Affiliations

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

Articles/Interviews Featuring Bruce S. Nathan

- **Bruce S. Nathan is quoted in NACM eNews regarding the effect of prepackaged and prearranged chapter 11 plans on unsecured creditors** *NACM eNews*, January 26, 2017
- **Bruce S. Nathan is quoted in Business Credit, attributing the increase of prepackaged Chapter 11 cases as a response to changes in the bankruptcy code in 2005 and the recession in 2008.** *Business Credit,* June 2016
- **Bruce Nathan comments in NACM eNews regarding the U.S. Supreme Court's affirmance of the elimination of limits on creditors' ability to garner a spousal guarantee.** *NACM eNews,* March 24, 2016
- **Bruce S. Nathan is quoted in NACM eNews regarding the tenuous financial condition of certain large retailers, and the risks facing credit professionals in 2016 when making their credit decisions in sales to such retailers.** *NACM eNews,* January 21, 2016
- **Bruce S. Nathan is quoted in NACM eNews, predicting that the recent rate hike and future hikes by the Federal Reserve should increase the number of bankruptcy filings.** *NACM eNews,* December 17, 2015
- **Bruce S. Nathan is quoted in NACM eNews regarding the new official forms, including the new proof of claim form, used in bankruptcy cases, which became effective December 1.** *NACM eNews,* December 10, 2015
- **Bruce S. Nathan is quoted in NACM eNews concerning the increasing number of unsuccessful retail bankruptcy reorganizations.** *NACM eNews,* November 19, 2015
- **Bruce S. Nathan is quoted in NACM eNews regarding the risk of a future bankruptcy filing when a company buys a financially distressed company and in the process overleverages itself.** *NACM eNews,* November 12, 2015
- **Bruce S. Nathan is quoted in NACM eNews regarding the growing competition for retailers such as A&P and other independent retailers from big box retailers, including Walmart and Target.** *NACM eNews,* August 27, 2015
- **Bruce S. Nathan is quoted in NACM eNews concerning the potentially deleterious effects of navigating in and out of bankruptcy court too quickly.** *NACM eNews,* June 25, 2015
- **Bruce S. Nathan comments in NACM eNews regarding the Supreme Court's ruling that bankruptcy courts may not award attorneys' fees for work performed in defending their fee application in court.** *NACM eNews,* June 18, 2015
- **Lowenstein Sandler LLP Selected to Represent Official Committee of Unsecured Creditors of Gourmet Express** March 31, 2015
- **Bruce S. Nathan comments in the May 2014 Financier Worldwide Magazine on identifying early warning signs concerning a financially distressed customer and suggested steps vendors should take to mitigate their losses.** *Financier Worldwide Magazine,* May 2014
- **Lowenstein Sandler Retained as Unsecured Creditors' Counsel in Coldwater Creek Chapter 11 Case** April 25, 2014
- **Bruce S. Nathan is mentioned in Law360 in connection with his representation of the Official Committee of Unsecured Creditors of Coldwater Creek Inc.** *Law360,* April 25, 2014
- **Bruce S. Nathan was quoted in the National Association of Credit Management's eNews regarding claims against General Motors.** *NACM's eNews,* April 24, 2014
- **In NACM's eNews for December 12, 2013, Bruce Nathan comments on how the recent Supreme Court ruling regarding forum-selection clauses continues to allow**

opportunities for subcontractors in contract negotiations. *NACM's eNews,* December 12, 2013

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

Publications

- **"The Strict Compliance Requirement for Letters of Credit is Really Strict,"** Bruce S. Nathan, Eric Chafetz, *Business Credit*, February 2017
- **"A New Preference Defense?,"** Bruce S. Nathan, Barry Z. Bazian, *Business Credit*, January 2017
- **What Constitutes Sufficient Notification of a Security Interest to Cut Off Trade Creditors' Setoff Rights?,"** Bruce S. Nathan, Barry Z. Bazian, *CRF News*, 4th Quarter 2016
- **"Court Ruling A Reprieve for Bankruptcy Reclamation Rights?,"** Bruce S. Nathan, David M. Banker, Barry Z. Bazian, *Business Credit*, November/December 2016
- **"Purchasing Claims Free and Clear of a Debtor's Defenses,"** Bruce S. Nathan, Scott Cargill, *American Bankruptcy Institute Journal*, October 2016
- **"Mind Your Ts and Cs (Terms & Conditions),"** Bruce S. Nathan, Lowell A. Citron, Chad S. Pearlman, *Business Credit*, September/October 2016
- **"A Little More You Need to Know About the "Ordinary Course of Business" and "New Value" Preference Defenses,"** Bruce S. Nathan, David M. Banker, Eric Chafetz, Barry Z. Bazian, *The Credit and Financial Management Review*, 3rd Quarter 2016
- **"Cautionary Tale for Section 503(b)(9) Claimants: Filing a Proof of Claim Might Thwart Recovery,"** Bruce S. Nathan, David M. Banker, *CRF News*, 3rd Quarter 2016
- **"A Preference Split Decision on the New Value and Ordinary Course of Business Defenses: Win Some, Lose Some!,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* July/August 2016
- **"Second Circuit Overturns Visa/MasterCard Antitrust Settlement,"** Bruce S. Nathan, Andrew David Behlmann, *NACM eNews,* July 7, 2016
- **"The Benefits of Properly Documenting a Consignment Transaction and the Potential For Recovery By Creditors that Don't!,"** Bruce S. Nathan, David M. Banker, Barry Z. Bazian, *CRF News,* 2nd Quarter 2016
- **"U.S. Supreme Court's Split Decision on Enforceability of Spousal Guarantee Limits," Bruce S. Nathan,** *Business Credit,* June 2016
- **"Petitioning Creditor Eligibility to Join an Involuntary Bankruptcy Petition,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* May 2016
- **"The Timing of Receipt of Goods in International Transactions Could Be Hazardous to Section 503(b)(9) Priority Status,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* April 2016
- **"Social Media: The New Reality for Credit Professionals,"** Mary J. Hildebrand, CIPP/US/E, Bruce S. Nathan, Cassandra M. Porter, CIPP/US, *CRF News,* 1st Quarter 2016
- **"Spotting the Sinking Ships,"** Bruce S. Nathan, Kenneth A. Rosen, Scott Cargill, *The Financial Manager,* March/April 2016
- **"Letter of Credit Coverage of Preference Risk: Overcoming a Fraud Injunction,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* March 2016
- **"Petitioning Creditors Beware,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* February 2016
- **"More Shocking Developments on Whether Electricity is a Good Entitled to Section 503(b)(9) Administrative Priority Status,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* January 2016
- **"Rolling the Dice: Proving the Subjective Ordinary Course of Business Defense at Trial,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* December 2015
- **"Getting More from a Creditor's Committee,"** Bruce S. Nathan, Eric Chafetz, *CRF News,* 4th Quarter 2015

- **"The Hazards To Secured Status Caused by Minor Mistakes In A Security Agreement,"** Bruce S. Nathan, David M. Banker, *CRF News,* 3rd Quarter 2015
- **"Debtor Setoff Rights Can Endanger Recoveries on § 503(b)(9) Claims,"** Bruce S. Nathan, Scott Cargill, *American Bankruptcy Institute Journal,* October 2015
- **"Section 503(b)(9) Priority Claims Under Attack,"** Bruce S. Nathan, Scott Cargill, *Business Credit,* July/August 2015
- **"Involuntary Bankruptcy Petition Risk: Dismissal Can Be Costly to Petitioning Creditors,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* June 2015
- **"Electronic Signatures Agreements and Documents: The Recipe For Enforceability and Admissibility,"** Bruce S. Nathan, Terence D. Watson, *The Credit and Financial Management Review,* Second Quarter 2015
- **"Triumph over a Secured Lender,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* May 2015
- **"Joint Check Agreement Does Not Cut the Mustard to Avoid Preference Liability,"** Bruce S. Nathan, David M. Banker, *Business Credit,* April 2015
- **"Delaware Bankruptcy Court Grants Summary Judgment Dismissing Preference Complaint Based on Ordinary Course of Business Without a Trial,"** Bruce S. Nathan, David M. Banker, *Business Credit,* March 2015
- **"Creditors Beware: Post-Petition Standby Letter of Credit Payments May Reduce New Value Defense,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* February 2015
- **"A New Twist on the Contract Assumption Defense to Preference Claims,"** Bruce S. Nathan, David M. Banker, *Business Credit,* January 2015
- **"Does the Equal Credit Opportunity Act Apply to Spousal Guarantors? Yes and No!,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* November/December 2014
- **"Paid New Value Preference Defense Prevails Again In Delaware!,"** Bruce S. Nathan, *CRF News,* October 2014
- **"Limits on Foreign Goods Sellers' §503(b)(9) Priority Rights,"** Bruce S. Nathan, Scott Cargill, *American Bankruptcy Institute Journal,* October 2014
- **"Section 503(b)(9) Priority Status Limited for Shipments from Abroad,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* September/October 2014
- **"Materialman's Lien Rights: Post-Petition Perfection Approved,"** Bruce S. Nathan, *Business Credit,* July/August 2014
- **"Expanding the Scope of the Contemporaneous Exchange for New Value Preference Defense to Multiple Party Transactions,"** Bruce S. Nathan, David M. Banker, *Business Credit,* June 2014
- **"Insuring Your Largest Asset, Your Accounts Receivable - Demystifying Credit Insurance and Negotiating the Best Possible Policy,"** Bruce S. Nathan, Christopher C. Loeber, Eric Jesse, *Business Credit,* June 2014
- **"Mistakes in a UCC Financing Statement's Collateral Description Can Be Hazardous to a Perfected Security Interest!,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* May 2014
- **"Another Bankruptcy Blow for Triangular Setoff,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* April 2014
- **"Counting a Creditor's New Value Paid Post-Petition: You Can Have Your Cake and Eat It Too,"** Bruce S. Nathan, Eric Chafetz, *Business Credit,* March 2014
- **"Construction Trust Fund Payments as a Defense to Preference Claims: A Matter of Tracing,"** Bruce S. Nathan, *Business Credit,* February 2014
- **"Sparks Continue to Fly – Electricity is not Eligible for Section 503(b)(9) Status and Other Shocking Developments,"** Bruce S. Nathan, Michael S. Etkin, David M. Banker, *Business Credit,* January 2014

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

- **"Who Pays the Freight? Interplay Between Priority Claims and a Debtor's Secured Lender,"** Bruce D. Buechler, Bruce S. Nathan, *American Bankruptcy Institute Journal,* November 2011
- **"Is There a Small Preference Venue Limit? Yes and No!,"** Bruce S. Nathan, *Business Credit,* November/December 2011
- **"Trade Creditor Remedies Manual: Trade Creditors' Rights Under The UCC and the U.S. Bankruptcy Code,"** Bruce S. Nathan, Scott Cargill, *American Bankruptcy Institute,* 2011
- **"Standby Letters of Credit and the Independent Principle,"** Bruce S. Nathan, *Business Credit,* September/October 2011
- **"Another Ordinary Course of Business Preference Defense Double Feature,"** Bruce S. Nathan, *Business Credit,* July/August 2011
- **"Everything You Need to Know About New Value as a Preference Defense, and More,"** Bruce S. Nathan, Scott Cargill, David M. Banker, *The Credit and Financial Management Review,* Second Quarter 2011
- **"Joint Check Agreements: Who's on First?,"** Bruce S. Nathan, *Business Credit,* June 2011
- **"Paid for New Value as a Preference Defense, More Good News for the Trade,"** Bruce S. Nathan, *Business Credit,* May 2011
- **"Reclamation Catch-22: Darned If You Do, Darned If You Don't,"** Bruce S. Nathan, David M. Banker, *Business Credit,* May 2011
- **"Yet Another Favorable Court Decision Upholding the Ordinary Course of Business Preference Defense,"** Bruce S. Nathan, *Business Credit,* April 2011
- **"Counting Section 503(b)(9) Priority Claims as Part of a Creditor's New Value Defense to a Preference Claim: Can You Have Your Cake and Eat It Too?,"** Bruce S. Nathan, *Business Credit,* March 2011
- **"Electricity as Goods Entitled to Section 503(B)(9) Priority Status: A Boom for Utilities,"** Bruce S. Nathan, *Business Credit,* February 2011
- **"Critical Vendor Update,"** Bruce S. Nathan, *Business Credit,* January 2011
- **"The Contract Assumption Defense to Preference Claims: Alive and Thriving,"** Bruce S. Nathan, *Business Credit,* November/December 2010
- **"Proving the Subjective Component of the Ordinary-Course-of-Business Defense,"** Bruce S. Nathan, Scott Cargill, *American Bankruptcy Institute Journal,* November 2010
- **"A Preference Ordinary Course of Business Defense Double Feature,"** Bruce S. Nathan, *Business Credit,* September/October 2010
- **"Do Fully Funded Section 503(b)(9) Priority Claims Count as Additional New Value to Reduce Preference Liability? A Contrary View!,"** Bruce S. Nathan, *Business Credit,* July/August 2010
- **"Section 503(b)(9) Priority Claim Developments: The Beat Goes On!,"** Bruce S. Nathan, *Business Credit,* June 1, 2010
- **"Vendors Beware: The Risk of a Debtor's Unauthorized Post-petition Payments For Post-petition Goods or Services,"** Bruce S. Nathan, *Business Credit,* May 2010
- **"Creditors' Committee Disclosure Obligations Updated: The Use of Internet Websites,"** Bruce S. Nathan, *Business Credit,* April 2010
- **"The Interplay Between Section 503(b)(9) Priority Claims and Preference Claims,"** Bruce S. Nathan, *Business Credit,* March 2010
- **"Section 503(b)(9) Goods Supplier Priority - Beware of the Debtor's Setoff Rights,"** Bruce S. Nathan, *Business Credit,* February 2010
- **"Hooray for Delaware - A Tale of Two Decisions,"** Bruce S. Nathan, *Business Credit,* January 2010

- **"Recent Case Law Developments Concerning Section 503(b)(9) 20-Day Goods Priority Claims,"** Bruce S. Nathan, *Business Credit,* November/December 2009
- **"The 20-Day Goods Priority Claim Under Bankruptcy Code Section 503(b) (9),"** Bruce S. Nathan, Scott Cargill, *The Credit and Financial Management Review,* Fourth Quarter 2009
- **"Compelling Postpetition Trade Credit: Navigating Uncharted Waters,"** Bruce S. Nathan, Scott Cargill, *American Bankruptcy Institute Journal,* October 2009
- **"Compelling Bankruptcy Trade Credit: The Great Unknown,"** Bruce S. Nathan, *Business Credit,* September/October 2009
- **"The Limits of Consignment Rights When Consigned Goods Are Manufactured Into Finished Product,"** Bruce S. Nathan, *Business Credit,* July/August 2009
- **"Enforceability of Triangular Setoff Rights In Safe Harbor Contracts - Still An Open Question? Part 2,"** Bruce S. Nathan, S. Jason Teele, Matthew A. Magidson, *Derivatives Week,* June 29, 2009
- **"Enforceability of Triangular Setoff Rights In Safe Harbor Contracts - Still An Open Question? Part 1,"** Bruce S. Nathan, S. Jason Teele, Matthew A. Magidson, *Derivatives Week,* June 22, 2009
- **"Demystifying Chapter 15 of the Bankruptcy Code,"** Bruce S. Nathan, *Business Credit,* June 2009
- **"Credit Card Payments as Preferences: The Sixth Circuit Joins the Bandwagon,"** Bruce S. Nathan, *Business Credit,* June 2009
- **"Preference Dynamic Duo II: Whatever Happened to the Small Preference Venue Limitation?,"** Bruce S. Nathan, *Business Credit,* May 2009
- **"Triangular Setoff: A Viable Remedy or a Thing of the Past?,"** Bruce S. Nathan, *Business Credit,* April 2009
- **"Is Debtor's Credit Card Payment a Preference,"** Bruce S. Nathan, *Business Credit,* March 2009
- **"Effective Seller Remedies When Confronting a Financially Distressed Buyer Prior to Bankruptcy,"** Bruce S. Nathan, *Business Credit,* February 2009
- **"Recent Court Decisions on Consignments and Other Security Arrangements: The Benefits of Aggressive Creditor Action and the Pitfalls of Failing to Document Properly,"** Bruce S. Nathan, *Business Credit,* January 2009
- **"Builders Trust Fund Payments: A Defense to Preference Exposure,"** Bruce S. Nathan, *Business Credit,* November/December 2008
- **"Impact of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act on Retail Bankruptcies,"** Bruce S. Nathan, *Journal of Trading Partner Practices,* November 11, 2008
- **"Courts Remain Split over Whether a Debtor's Credit Card Payment is an Avoidable Preference,"** Bruce S. Nathan, Scott Cargill, *ABI Journal,* October 2008
- **"Release of State Mechanic's and Other Lien Law Rights As a Defense to Preference Claims? Yes and No!,"** Bruce S. Nathan, *Business Credit,* October 2008
- **"Overseas Bear Stearns Hedge Funds Denied Chapter 15 Relief,"** Bruce S. Nathan, *Business Credit,* July/August 2008
- **"Mechanic's Liens and the Bankruptcy Code,"** Bruce S. Nathan, *Business Credit,* June 2008
- **"Is a Debtor's Credit Card Payment a Preference?,"** Bruce S. Nathan, *Business Credit,* May 2008
- **"PACA Trust Destroyed by Written Agreement Extending Payment Terms,"** Bruce S. Nathan, *Business Credit,* April 2008
- **"State Law Artisans' Lien Rights Defeat Preference Exposure - The Saga Continues,"** Bruce S. Nathan, *Business Credit,* March 2008

- **"The Critical Vendor Roller Coaster,"** Bruce S. Nathan, *Business Credit,* February 2008
- **"Section 503(b)(9) Goods Supplier Priority — More Recent Developments,"** Bruce S. Nathan, *Business Credit,* January 2008
- **"Beware of Claims Bar Dates for Section 503(b)(9) Administrative Priority Claims in Favor of Goods Suppliers,"** Bruce S. Nathan, *Business Credit,* November/December 2007
- **"Are State Preference Laws Preempted by the United States Bankruptcy Code? Not Necessarily!,"** Bruce S. Nathan, Scott Cargill, *The Credit and Financial Management Review, Volume 13, Number 4,* Fourth Quarter 2007
- **"The Risks of a Single Creditor Involuntary Bankruptcy Petition; Tread Extra Carefully!,"** Bruce S. Nathan, *Business Credit,* October 2007
- **"A Preference Dynamic Duo: State Law Lien Rights Defeat Preference Claim While Payment by Credit Card Does Not!,"** Bruce S. Nathan, *Business Credit,* September 2007
- **"Credit Transactions May Be Eligible for the Section 547 (c)(1) Contemporaneous Exchange for New Value Defense to Preference Exposure: The Third Circuit Court of Appeals Speaks,"** Bruce S. Nathan, *Business Credit,* July/August 2007
- **"Preference Checklist,"** Bruce S. Nathan, *Business Credit,* June 2007
- **"Recent Favorable Preference Rulings for Construction Material and Service Suppliers,"** Bruce S. Nathan, *Business Credit,* June 2007
- **"Paid for New Value Really Does Count: An Update on the New Value Defense and Other Preference Issues,"** Bruce S. Nathan, *Business Credit,* May 2007
- **"Recent Case Law Development Under the 2005 Amendments to the Bankruptcy Code—Part II,"** Bruce S. Nathan, Scott Cargill, *Business Credit Journal of NACM Oregon,* May 2007
- **"Reclamation Rights Under BAPCPA: The Same Old Story,"** Bruce S. Nathan, *Business Credit,* April 2007
- **"Recent Case Law Development Under the 2005 Amendments to the Bankruptcy Code—Part 1,"** Bruce S. Nathan, Scott Cargill, *Business Credit Journal of NACM Oregon,* April 2007
- **"The New 20-Day Administrative Claim in Favor of Goods Suppliers: Yes to Priority; No to Immediate Payment,"** Bruce S. Nathan, *Business Credit,* March 2007
- **"The ABCs of Legal Issues Encountered by Credit Professionals,"** Bruce S. Nathan, *Business Credit,* February 2007
- **"Joint Check Arrangement Does Not Protect Against Preference Exposure,"** Bruce S. Nathan, *Business Credit,* January 2007
- **"Bailment Or Consignment: It Makes A Difference!,"** Bruce S. Nathan, *Business Credit,* November/December 2006
- **"The BAPCPA Ordinary Course Of Business Defense To Preference Claims: At Last, A Court Speaks,"** Bruce S. Nathan, *Business Credit,* October 2006
- **"A Trade Creditor's Post-Petition Obligations Under An Unexpired Executory Contract Prior To Assumption Or Rejection: The Muddled State Of The Law,"** Bruce S. Nathan, *Business Credit,* September 2006
- **"Being Fully Secured Defeats Preference Exposure,"** Bruce S. Nathan, *Business Credit,* July/August 2006
- **"Manual of Credit And Commercial Laws,"** Bruce S. Nathan, *National Association of Credit Management (97th Edition),* 2006
- **"Reclamation Manual/Sellers' Rights of Reclamation, Stoppage of Delivery and New Administrative Claim,"** Bruce S. Nathan, *American Bankruptcy Institute,* 2006
- **"Involuntary Bankruptcy Petition Upheld: Media Providers' Claims Against Advertising Agency NOT Subject To Bona Fide Dispute,"** Bruce S. Nathan, *Business Credit,* June 2006

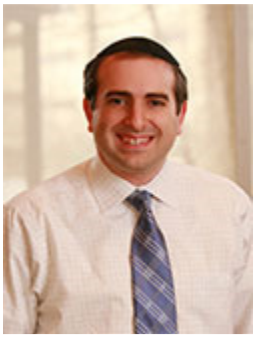
- **"Sales of Trade Claims: The Rewards and The Risks,"** Bruce S. Nathan, *Business Credit,* May 2006
- **"The New Creditors' Committee Disclosure And Solicitation Obligations: The Refco Blueprint!,"** Bruce S. Nathan, *Business Credit,* April 2006
- **"Getting The Biggest Bang For Your New Value Preference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

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

Bar Admissions

- 1981, New York

Lowenstein Sandler



Philip J. Gross
Counsel

New Jersey
Tel 973.597.6246 Fax 973.597.6247
E-mail: pgross@lowenstein.com

Practice

Philip's practice focuses on counseling secured and unsecured creditors, debtors, and committees in commercial bankruptcy proceedings, as well as on providing banks, funds, and other clients with structuring and out-of-court advice. He guides clients through all phases of bankruptcy matters to ensure their success, from pre-bankruptcy negotiations and first-day hearings through plan confirmation and beyond. Philip has extensive experience in national contested bankruptcy hearings and trials, Chapter 15 recognition and Chapter 9 municipality proceedings, and bankruptcy appeals at the federal district and circuit court levels.

Prior to joining Lowenstein Sandler, Philip was an associate at Kaye Scholer LLP in New York City. He served as the 2006 Milton Pollack Fellow in the Southern District of New York (SDNY), where he worked with the Honorable Loretta A. Preska, Chief Judge of the United States District Court for the SDNY, and former Attorney General/SDNY Chief Judge Michael B. Mukasey to draft a report for district court judges on issues and challenges that arise in high-security and terrorism trials, entitled "Guide to High Security & Terrorism Cases" (2006). The guide has been extensively cited in publications issued by the Federal Judicial Center, including Robert Timothy Reagan's "National Security Case Studies: Special Case-Management Challenges" (Federal Judicial Center, June 25, 2013).

Education

- **Fordham University School of Law** (J.D., 2008), *Fordham Urban Law Journal, Notes & Articles Editor; Milton Pollack Fellow (Summer 2006), U.S. District Court, Southern District of New York*
- **Yeshiva University** (B.A., 2002), *Computer Science, summa cum laude*

Representative Experience

- Hanjin Shipping Co., Ltd. – District of New Jersey, Chapter 15 recognition proceeding, counsel to several container terminal operators and railway/transportation carrier.
- Horsehead Holding Corp. – District of Delaware, counsel to official committee of unsecured creditors.
- United Mine Workers of America – bankruptcy counsel to labor union in the following bankruptcy cases: Patriot Coal Corp. (Bankr. E.D. Va.); Walter Energy, Inc. (Bankr. N.D. Ala.); Alpha Natural Resources, Inc. (Bankr. E.D. Va.).
- NJ Healthcare Facilities Management LLC – counsel to secured creditor/nursing home facility owner.

- American Federation of State, County and Municipal Employees (AFSCME) – Detroit's Chapter 9 bankruptcy.
- Universal Cooperatives, Inc. – District of Delaware, counsel to official committee of unsecured creditors.
- Gridway Energy Holdings – District of Delaware, counsel to official committee of unsecured creditors.
- Daytop Village, Inc. – Southern District of New York, counsel to debtors.
- KidsPeace Corporation – Eastern District of Pennsylvania, counsel to official committee of unsecured creditors.
- Velo Holdings Inc. – Southern District of New York, counsel to major creditor/adversary proceeding defendant.
- Hostess Brands, Inc. – Southern District of New York, counsel to amicus curiae party and national pension fund.
- Ocean Place Development, LLC – District of New Jersey, counsel to debtors.
- Coach America Holdings – District of Delaware, counsel to debtors.
- Lighthouse Global Partners, LLC – Southern District of New York, counsel to liquidating trustee.

Articles/Interviews Featuring Philip J. Gross

- **Philip J. Gross is quoted in Debtwire regarding the implications of unresolved legal issues for creditors in Chapter 9 municipal bankruptcy cases.** *Debtwire,* October 20, 2016
- **Philip J. Gross is quoted in the Daily Bankruptcy Review regarding the settlement reached by Glacial Energy Holdings Inc. and the Official Committee of Unsecured Creditors. Gross represents the committee.** *Daily Bankruptcy Review,* June 17, 2014
- **Philip J. Gross is mentioned in Law360 for representing the Official Committee of Unsecured Creditors of Glacial Energy Holdings Inc.** *Law360,* June 16, 2014
- **S. Levine and P. Gross have been recognized in Law360 as "Legal Lions" for representing the American Federation of State, County and Municipal Employees (AFSCME) in its fight for pensions and other benefits in Detroit's Chapter 9 bankruptcy proceeding.** *Law360,* December 5, 2013
- **Sharon L. Levine, Wojciech F. Jung and Philip J. Gross are mentioned in Law360 for representing the American Federation of State County and Municipal Employees (AFSCME) in the Detroit Chapter 9 bankruptcy proceeding.** *Law360,* November 8, 2013
- **Lowenstein Represents Detroit's Largest Union in City Bankruptcy Proceedings** July 2013
- **In The Deal Pipeline, Sharon L. Levine and Philip J. Gross are highlighted for representing the American Federation of State, County and Municipal Employees in the Chapter 9 case of the City of Detroit.** *The Deal Pipeline,* July 24, 2013
- **Norman Kinel and Philip Gross are highlighted for representing Daytop Village, Inc. and Daytop Village Foundation Incorporated in their chapter 11 cases** *The Deal Pipeline,* May 28, 2013

Publications

- **"Does a Bankruptcy Court Have the Authority to Disband an Official Committee?,"** Philip J. Gross, Norman Kinel, *New York Law Journal,* June 3, 2015
- **"Chapter 9 May Be Tough to Swallow for Unions, Retirees,"** Philip J. Gross, *Journal of Corporate Renewal,* June 2014
- **"If You Assign Your Plan Vote — Mean It,"** Wojciech F. Jung, Philip J. Gross, *Law360,* July 9, 2013
- **"Subordination Agreements Work: If You Assign Your Plan Vote – Mean It,"** Wojciech F. Jung, Philip J. Gross, *Bankruptcy, Financial Reorganization & Creditors' Rights Client Alert,* July 3, 2013

Bar Admissions

- 2009, New York
- 2008, New Jersey

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