

# THE UNIFORM COMMERCIAL CODE SALES, BULK SALES AND SECURED TRANSACTIONS

Presented By:  
NACM CREDIT LEARNING CENTER

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## CONTRACT FORMATION: COMMON LAW

- Contract Created by Offer and Acceptance
- Mirror Image Rule
- Acceptance at Variance With Offer = Rejection/Counteroffer
- Last Document Controls Terms

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## UNIFORM COMMERCIAL CODE ARTICLE 2 – SALES

- Applies to Domestic Sales of Goods
- Contains uniform provisions for:
  - Formation of contracts
  - Terms
  - Warranties – protection for buyer
  - Remedies
  - State not Federal law
  - May vary by state

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UNIFORM COMMERCIAL CODE  
ARTICLE 2 – SALES  
CONTRACT FORMATION

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

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UNIFORM COMMERCIAL CODE  
ARTICLE 2 – SALES CONTRACT  
FORMATION

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

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BATTLE OF THE FORMS

- Contract May be Created Even if Variance Between Offer and Acceptance
- If both parties are merchants, different or additional terms may become part of sales contract unless:
  - They are a material alteration;
  - Counterparty objects; or
  - Offer limits acceptance terms
- Conduct May Signal Acceptance of Additional Terms

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## BATTLE OF FORMS EXAMPLES OF PROVISION LIMITING NEW TERMS

- **Buyer's Side**
  - "Any acceptance of this order that contains terms inconsistent with or in addition to the terms of this order is not binding unless agreed to by buyer in writing."
- **Seller's Side**
  - "Buyer shall not change any of the terms and conditions contained in this Credit Application, unless seller agrees in writing."

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## MODIFICATION OF SALE CONTRACTS

- **Agreement of Parties**
- **One Exception: Prior Agreements May be Changed by:**
  - Course of performance, course of dealing, or usage of trade; and
  - Consistent additional terms
  - Unless the court finds the prior written agreement was intended as a complete and exclusive statement of the terms of the agreement

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## TITLE AND RISK OF LOSS

- **Shipment Contract**
  - Seller delivers goods to carrier for delivery to the buyer
  - Unless otherwise agreed, both title and risk of loss pass to buyer when carrier receives the goods
- **Terms**
  - FOB (Free on Board) place of shipment
  - FAS (Free Alongside) at a named port
  - CIF (price includes Cost of the Goods, Insurance and Freight)
  - C&F (price includes Cost of the Goods, and Freight)

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## TITLE AND RISK OF LOSS

- **Destination Contract**
  - Requires seller to guarantee delivery of goods to specific destination
  - Unless otherwise agreed, title and risk of loss pass to buyer when goods arrive at destination
  - Seller responsible for delivery expense to destination
- **Terms**
  - FOB destination
  - Ex-ship
  - No arrival, no sale

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## WARRANTIES

- **Protections to Persons Purchasing Goods**
- **Express Warranties**
  - Seller promises regarding quality, character and suitability of goods
  - Example: Goods will conform to description or sample
- **Implied Warranties**
  - Imposed by law
  - Merchantability
  - Fitness for particular purposes

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## WARRANTIES

- **Warranties Can be Limited or Excluded**
  - “As-is” “where is”
  - With all faults
  - Waiver of warranty of merchantability must mention merchantability and be conspicuous
- **Liability – Damage Limitations**
- **Limited Period for Buyer to Assert Claims**

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**UNIFORM COMMERCIAL CODE  
REMEDIES – ADEQUATE  
ASSURANCE DEMAND**

- UCC 2-609 Governs
- Upon Reasonable Grounds for Insecurity, a Contract Party Can Demand Adequate Assurance of Due Performance From Financially Distressed Party
  - Form of Adequate Assurance Demand – Supp. Tab 1 at p. 1
- Pending Receipt of Such Performance, the Contract Party Can Suspend Performance
- Financially Distressed Party’s Failure to Provide Such Performance Within Reasonable Time Not Exceeding 30 Days Results in Repudiation of Contract

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**UNIFORM COMMERCIAL CODE  
REMEDIES – ADEQUATE  
ASSURANCE DEMAND**

- Reasonable Grounds for Insecurity
  - Determined by “commercial standards” as between merchants
  - Customer past due
    - With the seller
    - With other vendors

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**UNIFORM COMMERCIAL CODE  
REMEDIES – ADEQUATE  
ASSURANCE DEMAND**

- Additional Reasonable Grounds for Insecurity
  - Default under Debtor’s loan facility
  - Concern over Debtor’s ability to pay upcoming principal and/or interest installment on bond debt
  - Downgrade by credit rating agency to unacceptably low level
  - Continued poor financial results
  - Threats of customer bankruptcy

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**UNIFORM COMMERCIAL CODE  
REMEDIES – ADEQUATE ASSURANCE  
OF PERFORMANCE**

- **What constitutes adequate assurance of performance?**
  - Revoke credit terms and switch to cash in advance
  - Collateral security
  - Letter of credit

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**STOPPAGE OF DELIVERY**

- **Creditor’s Right to Stop Delivery of Goods to Customer Due to Insolvency or Breach Governed by UCC 2-702, 2-703 and 2-705**
  - Debtor’s insolvency
    - Balance Sheet: Liabilities exceed assets
    - Equity: Failure to pay debts as they mature

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**STOPPAGE OF DELIVERY**

- **Withholding Delivery of Goods in Creditor’s Possession and Switching to Cash Terms Going Forward**
- **Stopping Delivery of Goods in Possession of Carrier/Warehouse/ Other Third Party**

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## STOPPAGE OF DELIVERY

- **Notice Must be Given to Carrier/Warehouse and Debtor**
  - Form of Stoppage of Delivery Notice – Supp. Tab 2 at p. 2
- **Following Notice, Carrier, Warehouse/Other Third Party Must Hold and Deliver Goods According to Seller's Direction**
  - Seller liable for charges or damages

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## STOPPAGE OF DELIVERY

- **Right of Stoppage of Delivery Cut Off by Any of the Following:**
  - Debtor's receipt of goods
  - Acknowledgment by warehouse that it is holding goods for Debtor
  - Acknowledgment by carrier that is holding goods for Debtor by reshipping/holding
  - Negotiation to Debtor of negotiable bill of lading or warehouse receipt

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## STOPPAGE OF DELIVERY RIGHTS VS. SECURED INVENTORY LENDER

- **Stoppage of Delivery Rights Superior to Secured Inventory Lender's Rights**
- **In Contrast, Reclamation Rights are Subordinate to Secured Inventory Lender's Rights**

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## STOPPAGE OF DELIVERY— AFTER BANKRUPTCY FILING

- Seller Retains Rights Under UCC to Stop Delivery
- Not Precluded by Automatic Stay
- Debtor Usually Ends up Paying for Stopped Goods
- Must Seek Automatic Stay Relief in Bankruptcy Court to Obtain Return of Goods
- Be Prepared to Incur Charges of Carrier/Warehouser Holding Goods Prior to Release to Debtor or Return to Creditor

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## STATE LAW RECLAMATION

- Uniform Commercial Code Section 2-702
- Requirements for Reclamation
  - Credit terms/cash terms
  - Debtor insolvent
    - Balance Sheet: Liabilities exceed assets
    - Equity: Failure to pay debts as they mature

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## STATE LAW RECLAMATION – REQUIREMENTS

- Reclamation Demand Describing Goods
  - Written demand not required but recommended
    - Form of State Law Reclamation Demand – Supp. Tab 3 at p. 3
    - Preference risk arising from return of goods within 90 days of customer bankruptcy in response to oral reclamation demand
- Demand Sent Within 10 Days of Debtor's Receipt of Goods
  - Written misrepresentation of solvency exception

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## STATE LAW RECLAMATION

- Defenses
  - Sale of goods to good faith/bona fide purchaser prior to demand
    - Includes a creditor with a blanket security interest in inventory
  - Goods processed prior to demand
  - Goods commingled, cannot be traced prior to demand

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## STATE LAW RECLAMATION

- Remedy:
  - Recovery of goods
  - Replevin action in state court to obtain possession
    - Multiple replevin actions when goods are in multiple jurisdictions

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## BANKRUPTCY RECLAMATION

- Avoidance Powers of Trustee Subject to Rights of Seller of Goods That has Sold Goods to Debtor in Ordinary Course of Seller's Business to Reclaim Such Goods if Debtor has Received Such Goods While Insolvent, Within 45 Days Before Commencement of Bankruptcy Case

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## BANKRUPTCY RECLAMATION

- **Deadline to Reclaim Goods**  
Extended From 10 Days to 45 Days  
After Debtor's Receipt of Goods (or  
20 days After Bankruptcy Filing)
- **Written Reclamation Demand**
  - Form of Bankruptcy Reclamation  
Demand – Supp. Tab 4 at p. 4

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## BANKRUPTCY RECLAMATION

- **State Law Reclamation Defenses Apply**  
in Bankruptcy Cases. *In re Dana*  
*Corp.* (Bankruptcy Court,  
Southern District of New York –  
2007)
- **Reclamation Rights Limited to**  
Identifiable Goods in Debtor's  
Possession
- **Debtor's Insolvency – Balance Sheet**

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## BANKRUPTCY RECLAMATION REMEDIES

- **Return of Goods**
- **No Other Statutory Remedies**
- **Courts May Create Remedies in the  
Future**
  - Payment?
  - Administrative Claim?
  - Other?

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**BANKRUPTCY RECLAMATION  
– PRIOR LIEN DEFENSE**

- **WARNING !!! Seller's Reclamation Rights Still Subject to Prior Rights of a Creditor With a Security Interest in Such Goods**
  - Are reclamation claims rendered valueless by Debtor's pre-petition secured inventory lender?

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**BANKRUPTCY RECLAMATION  
– PRIOR LIEN DEFENSE**

- **Recent Court Decisions Continue Trend of Rendering Reclamation Rights Valueless as a Result of Pre-Petition Lender Secured by Inventory**
- **Exception: 6th Circuit Court of Appeals Decision in *Phar Mor* Case**

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**BANKRUPTCY RECLAMATION  
– PRIOR LIEN DEFENSE**

- **6th Circuit Rejected Other Court Holdings That Reclamation Rights are Wiped Out if Proceeds of Goods Paid Down Secured Claims**
- **U.S. Bankruptcy Court, Northern District of Texas – 2009, in *Pilgrim's Pride*, – Denied Reclamation in Light of Floating Pre-Petition Inventory Lien**

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**BANKRUPTCY RECLAMATION UNDER  
BAPCPA – A HOLLOW REMEDY?**

- Sounds Great on Paper
- Recovery Prospects  
Uncertain, But Possible!
- Send Reclamation Demand  
and Don't Ignore this  
Remedy!

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**BANKRUPTCY “20 DAY”  
ADMINISTRATIVE CLAIM**

- Administrative Claim for the Value of  
Goods Received by the Debtor Within  
20 Days Prior to Bankruptcy
- 20 Day Goods Must be Sold to the  
Debtor in the Ordinary Course of  
Debtor's Business
- Reclamation Rights Still Relevant for  
Goods Received by Debtor From 21–45  
Days Before Bankruptcy

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**BANKRUPTCY “20 DAY”  
ADMINISTRATIVE CLAIM**

- Safety Net for Trade Creditors that  
Supply Goods Not Services!
- Disregards More Onerous  
Requirements for Successful  
Reclamation
  - No written reclamation demand required
  - No secured inventory lender defense
  - No goods on hand requirement
  - No solvency defense

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## BULK SALE UCC ARTICLE 6

- Designed to Protect Creditors From Risk of Merchants Selling All Their Inventory for Less Than Fair Value
- Bulk Transfer is a Transfer of Majority of Inventory
- Many States Have Repealed Their Bulk Transfer Statutes
  - Other statutory remedies, such as fraudulent transfer claims, are available to protect trade creditors

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## BULK TRANSFER UCC ARTICLE 6

- Remaining States Have Either Original or Revised UCC Article 6
- Original Article 6
  - Bulk sale occurs if there is a sale “of a major part of the materials, supplies, merchandise and other inventory” outside of the ordinary course of business
  - 10-day bulk sale notice requirement to all creditors of seller
  - Buyer must maintain list of seller’s creditors and schedule of property obtained in bulk sale
  - Creditors can void non-compliant bulk sale
  - Very short 6 month statute of limitations
  - Concealed sales toll statute of limitations

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## BULK TRANSFER REVISED UCC ARTICLE 6

- Lessens The Burdens On Bulk Sale Buyers
- Includes Newly Defined Terms, such as “bulk sale,” “date of bulk sale” etc. Which Increase Certainty
- Bulk Sale is a Sale of More Than Half of Seller’s Inventory Outside the Ordinary Course of Business and Under Conditions In Which “Buyer has Notice... that Seller will Not Continue To Operate the Same or Similar Kind of Business After the Sale.”
- Expects any Asset Sales that Fall Below a Net Value of \$10,000, or that Exceed \$25 Million
- 45-Day Notice Requirement
- Where Seller has more than 200 creditors, notice requirement can be satisfied by filing the notice with the Secretary of State, rather than giving notice to all creditors

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## BULK TRANSFER UCC ARTICLE 6

- Information Retained for Creditors Differs from that Required Under Original Article 6
  - Buyer and Seller Must Agree on Net Contract Price to be Distributed and include in "Written Schedule of Distribution" to accompany notice to Creditors
- Remedy –
  - Money damages for non-compliance equal to creditor's claim reduced by any amount the creditor would not have realized if the buyer had complied
  - Buyer has good faith defense
  - Extends statute of limitations from 6 months to 1 year from date of bulk sale

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## CONSENSUAL SECURITY INTEREST – GOVERNING LAW

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

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## TRANSACTIONS NOT SUBJECT TO UCC ARTICLE 9

- Mechanic's Liens
- Aircraft, Ships and Motor Vehicles
- Wages
- Insurance Contracts, Except for:
  - Healthcare insurance receivables
  - Proceeds of UCC collateral

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## CONSENSUAL SECURITY INTEREST – CREATION

- Security Agreement Granting Security Interest in Collateral
  - Identifies Debtor and secured party
  - Must be signed or authenticated by Debtor
  - Must properly describe collateral by asset category
- Debtor has Interest in Collateral
- Value Extended to Debtor
  - Trade credit extension
  - Forbearance from collection

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## CONSENSUAL SECURITY INTEREST – CREATION

- Name of Debtor
  - Correct legal name
  - How to verify?
- Authority of Signer

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## CONSENSUAL SECURITY INTEREST – CLASSIFICATION OF COLLATERAL

- Accounts
- Goods
  - Inventory
  - Equipment
- Instruments
- Chattel paper
- General intangibles
- Investment property, such as securities and brokerage accounts
- Deposit accounts
- Letters of credit rights
- Commercial tort claims
- Supporting obligations
- Proceeds

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## CONSENSUAL SECURITY INTEREST – PERFECTION

### ■ Perfection

- Usually by filing UCC Financing Statement
  - See UCC Financing Statement – Supp. Tab 5 at pp. 5-6
  - Does not require Debtor’s signature
  - File by Debtor’s correct legal name
    - Impact of filing against wrong name?
    - Impact of filing against trade name?

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## CONSENSUAL SECURITY INTEREST – PERFECTION

### ■ Where to file UCC

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

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## CONSENSUAL SECURITY INTEREST – PERFECTION

- Longevity of UCC Financing Statement
  - Not perpetual
  - General rule: 5 years
    - May vary by state
- UCC Continued by Filing Continuation
  - Must be filed within 6 months prior to expiration
  - See UCC Amendment – Supp. Tab 6 at p. 7

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## CONSENSUAL SECURITY INTEREST – PERFECTION

- **Amending UCC**
  - Debtor name change
    - Old name seriously misleading
  - Adding/deleting collateral
  - Address changes
- **UCC Amendment Form**
  - For name changes, must file within 4 months to relate back
  - See UCC Amendment – Supp. Tab 6 at p. 7

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## CONSENSUAL SECURITY INTEREST – PERFECTION

- **Other Means of Perfection**
  - Possession of collateral
  - Control of collateral

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## PERFECTION METHODS BY TYPE OF COLLATERAL

Type of Collateral	Method of Perfection Under Article 9
Accounts	Filing
Agricultural Liens	Filing
Certified Securities	Possession or Filing
Commercial Tort Claims	Filing
Deposit Accounts	Control
Electronic Chattel Paper	Filing Control
General Intangibles	Filing
Goods	Filing Possession
Healthcare Insurance Receivables	Filing
Instruments	Filing Possession
Investment Property (other than certified securities)	Filing Control
Letter-of-Credit Rights	Control
Money	Possession
Negotiable Documents	Filing Possession
Oil, Gas or Other Minerals Before Extraction	Filing
Tangible Chattel Paper	Filing Possession

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## CONSENSUAL SECURITY INTEREST – PRIORITY

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

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## CONSENSUAL SECURITY INTEREST – PRIORITY

- **Priority Rules**
  - General rule: first to perfect wins
- **Exceptions with Priority Over First to Perfect**
  - Purchase Money Security Interests
  - Consignments
  - IRS and Certain Other Statutory Liens

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## CONSENSUAL SECURITY INTEREST – PURCHASE MONEY SECURITY INTEREST

- **Purchase Money Security Interest (“PMSI”)**
  - Security interest granted to seller of goods to secure purchase price
  - Requires compliance with UCC Article 9
  - Priority over prior perfected security interest in inventory by following UCC Article 9 rules for PMSI superpriority status

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**CONSENSUAL SECURITY INTEREST –  
PURCHASE MONEY  
SECURITY INTEREST**

- **UCC Article 9 Rules for Superpriority Status**
  - PMSI Security Agreement signed or authenticated by Debtor
  - **Equipment**
    - UCC filing within 20 days of receipt by Debtor
  - **Inventory**
    - UCC Filing before Debtor's receipt of goods
    - Authenticated written notification to prior secured inventory creditors
    - See PMSI Notice – Supp. Tab 7 at p. 8
      - Good for 5 years

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**CONSIGNMENT**

- **Consignment**
  - Delivery of goods having a value of at least \$1,000 to merchant for sale provided:
    - No security interest created in consigned goods
    - Goods not consumer goods prior to delivery; and
    - Merchant deals in goods of that kind under name other than that of consigner, is not auctioneer and is not generally not known by creditors to be substantially engaged in selling goods of others

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**CONSIGNMENT**

- **Consignment (cont'd)**
  - Requires UCC filing and compliance with UCC Article 9 – Supp. Tab 8 at p. 9
  - Priority over prior perfected security interest in inventory by following UCC Article 9 PMSI rules for superpriority status – Supp. Tab 9 at p. 11

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## UCC ARTICLE 9 REMEDIES

- Default is Condition to Debtor's Exercise of Article 9 Remedies
- Not Defined in UCC Article 9
- Governed by Contract
  - Nonpayment
  - Other events of default

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## UCC ARTICLE 9 REMEDIES FOLLOWING DEFAULT

- Collection Rights re Accounts
- Repossession of Collateral (Inventory/Equipment)
- Disposition of Collateral
  - Public vs. private sale
  - Notice requirements
    - Debtor
    - Guarantor/Secondary Obligor
    - Other creditors with security interest in same assets
  - Commercial reasonableness
  - Discharges creditor's security interest and subordinate liens and security interests

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## UCC ARTICLE 9 REMEDIES FOLLOWING DEFAULT

- Strict foreclosure
- Secured party acquires collateral in full or partial satisfaction of secured claim
- Requirements
  - Debtor's consent
  - Notice to
    - Guarantor/secondary obligor
    - Other secured creditors
  - No timely objection

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## SPEAKER BIO



**Bruce S. Nathan**  
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### Practice

Bruce S. Nathan is a member of the firm's Bankruptcy, Financial Reorganization & Creditors' Rights Group. Mr. Nathan concentrates on all aspects of creditors' rights and workouts in bankruptcy, out-of-court matters and other types of insolvency cases for secured creditors, creditors' committees, unsecured creditors, trustees and other creditors. Mr. Nathan serves as counsel to the unsecured creditors' committee in Interstate Bakeries Corporation and Advanced Marketing Services Inc., and has represented substantial creditor interests in the Enron, WorldCom, Solutia, Metromedia Fiber Network, Adelphia, Calpine, Helling-Meyers, and Linens 'n Things chapter 11 cases.

Mr. Nathan also negotiates and prepares letters of credit, guarantees, security, consignment, bailment, tolling, and other agreements for credit departments of institutional clients. Mr. Nathan is also involved in the negotiation and preparation of loan, letter of credit, and factoring documentation and other matters for banks, asset-based lenders and factors.

### Education

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



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## SPEAKER BIO

### Affiliations

- New York State Bar Association
- American Bar Association
  - Commercial Financial Services Committee
  - Business Bankruptcy Committee
- American Bankruptcy Institute
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  - Contributing Editor, *American Bankruptcy Institute Journal*, "Last in Line" Column
  - Lead Editor, "Second Circuit Cases Update"
  - Former Co-Chair, Unsecured Trade Creditors' Committee
  - Speaker at 2007 Annual Spring Meeting: "Why Ways to Leave Your Dubor: Lesser Known Remedies For Jilted Creditors"
  - Task Force on Preference
  - Chair, Task Force on Reclamations
  - Uniform Commercial Code Committee and Task Force - Revised Article 9 Firm
- Commercial Law League of America
- Association of Commercial Finance Attorneys
- National Association of Credit Management
  - Contributor to *Business Credit* - National Association of Credit Management Magazine
  - Member, Editorial Advisory Board
  - Member, National Association of Credit Management and Affiliates and Credit Groups or Bankruptcy, UCC Article 9, Consignments, Letter of Credit law and other credit-related issues
- Member of FICB, an Association of Executives in Financial, Credit and International Business. Presented at **The 4th China International Credit and Risk Management Conference**, Shanghai, China, September 21, 2007 and **FICB Teleconference**, December 13, 2007, on key provisions of People's Republic of China's 2004 Law on Enterprise Bankruptcy, similarities to and differences with the U.S. Bankruptcy Code, and upcoming implementation challenges.
- Lecturer, Executive Commercial Inc. on Bank Lending Institute and the Banking Law Institute on Commercial Loan Workouts & UCC Issues
- Contributor
  - Credit Today
  - National Credit News

### Articles/Interviews Featuring Bruce S. Nathan

- "Bruce S. Nathan discusses litigation surrounding creditors committee selection in light of recent changes to the U.S. Bankruptcy Code," *Dow Jones*, August 2, 2008

### Publications

- "The 20-Day Goods Priority Claim Under Bankruptcy Code Section 503(b)(9)," *Business Credit*, Scott Carpi, Credit Research Foundation, October 2008
- "Compelling Postpetition Trade Credit: Navigating Uncharted Waters," *Business Credit*, Scott Carpi, *American Bankruptcy Institute Journal*, October 2009
- "Compelling Bankruptcy Trade Credit: The Great Unknown," *Business Credit*, September/October 2009
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### Bar Admissions

- 1981, New York

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