CURRENT HOT CHAPTER 11 ISSUES FACING TRADE CREDITORS

Presentation for:

Riemer Conference 2018

Sponsored By Riemer Reporting Service

Hyatt Centric French Quarter New Orleans, LA

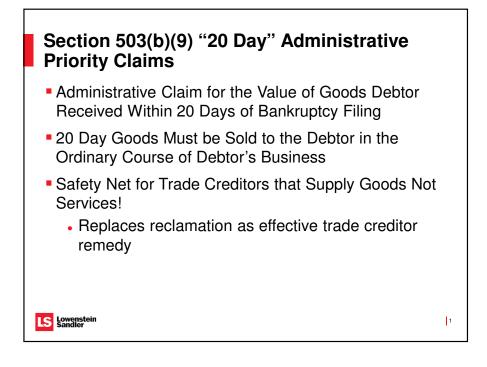
April 26, 2018

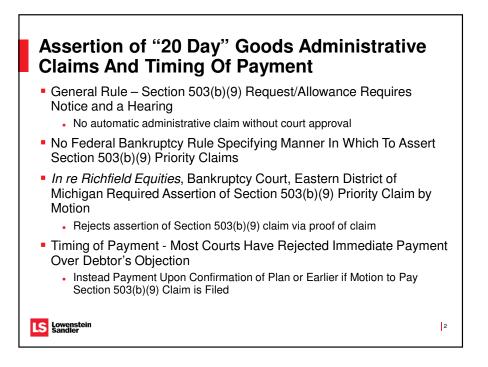


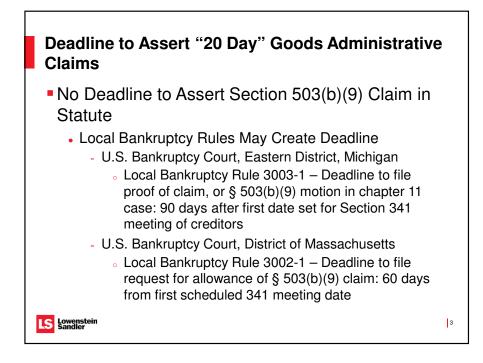
Presented By:

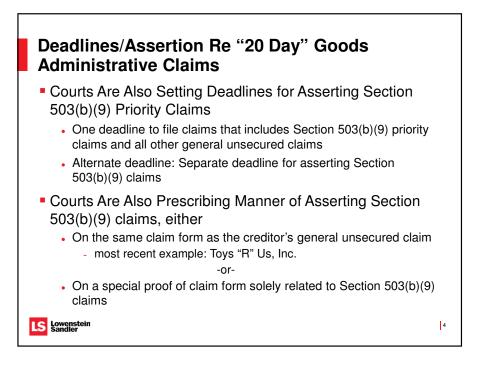
Bruce S. Nathan, Esq. Partner Tel: (212) 204-8686 bnathan@lowenstein.com @BruceSNathan Eric Chafetz, Esq. Counsel Tel: (646) 414-6886 <u>echafetz@lowenstein.com</u>

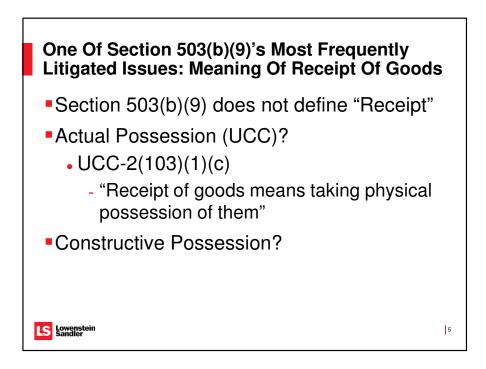


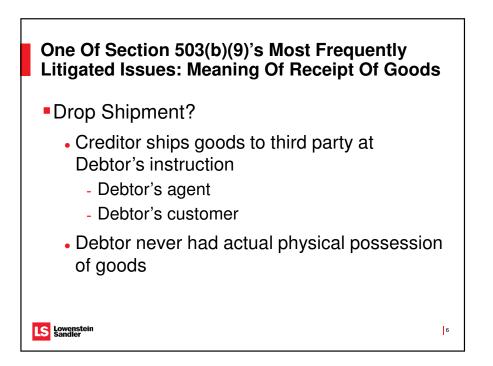


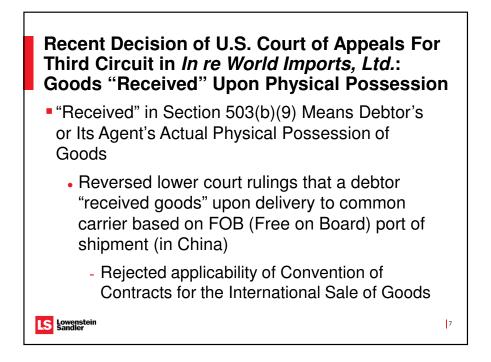




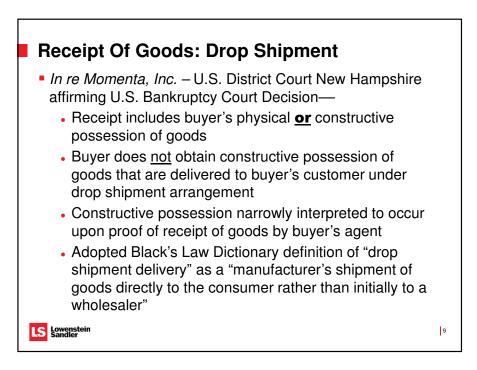


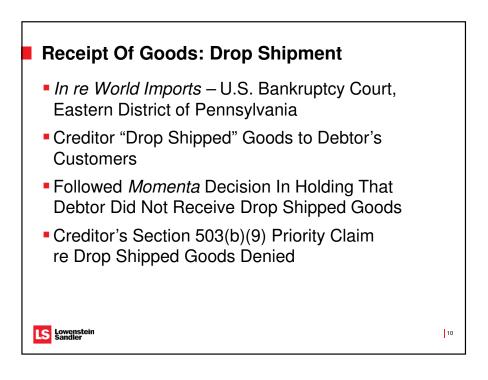


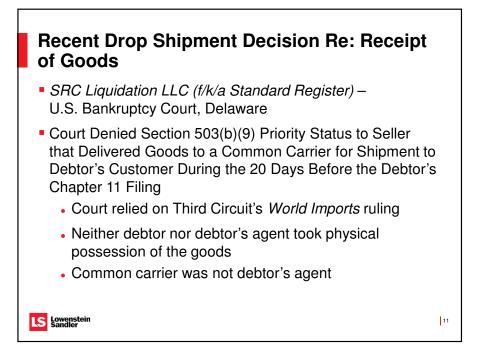


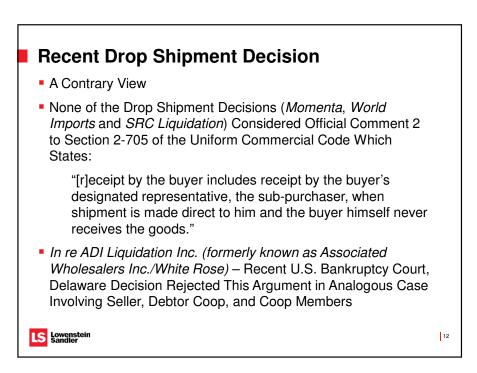


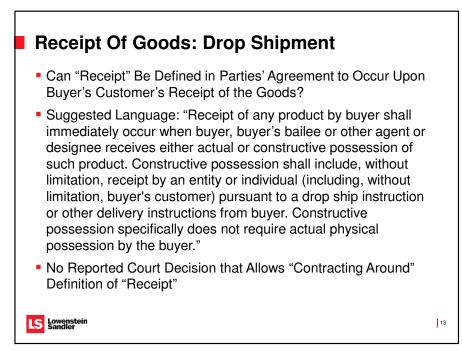


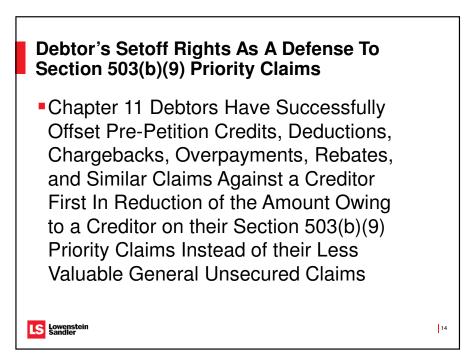










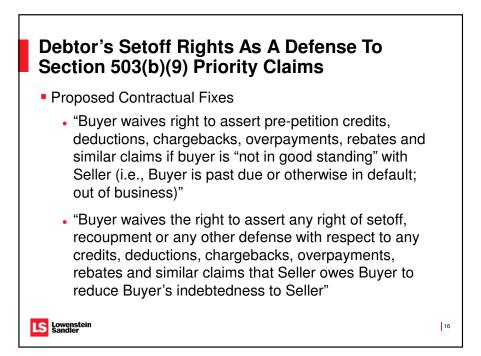


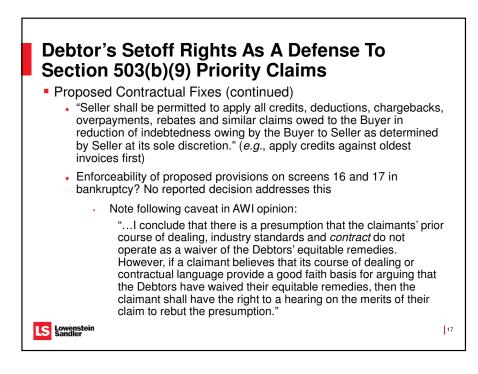


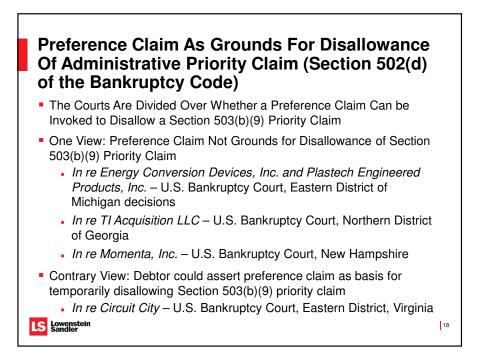
- Circuit City Stores (Bankruptcy Court, Eastern District of Virginia) and In re ADI Liquidation, Inc. (Bankruptcy Court, District of Delaware) Decisions
 - Debtor permitted to setoff pre-petition credit claims in reduction of Section 503(b)(9) priority claims
 - The courts invoked a little known Bankruptcy Code Section 558:
 - "The estate shall have the benefit of any defense available to the debtor..."
 - The Debtor could also offset pre-petition credits claims against creditors' unpaid post-petition administrative claims — VERY DANGEROUS!
 - Post-petition credit should be conditioned on Debtor's agreement not to deduct pre-petition credits and other related claims

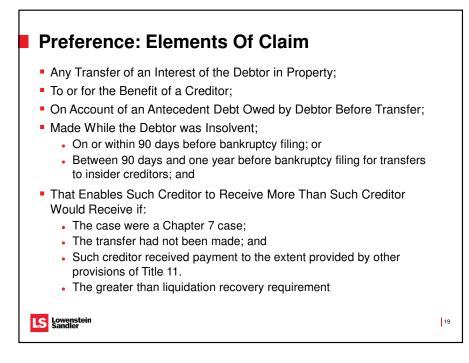
15

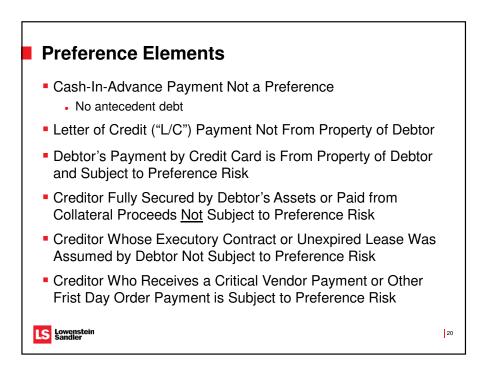
Lowenstein Sandler

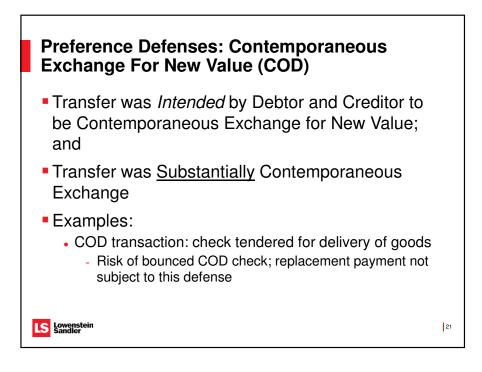


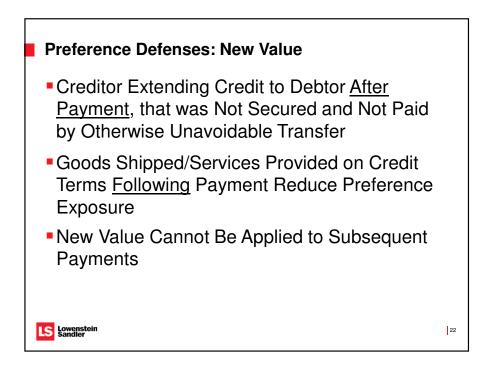


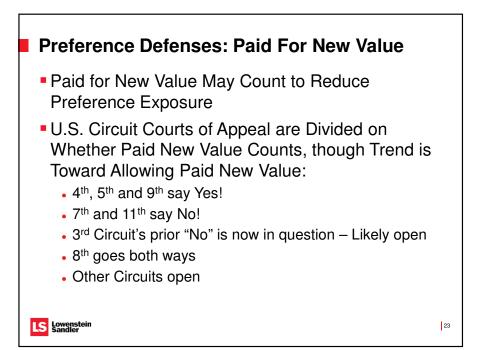


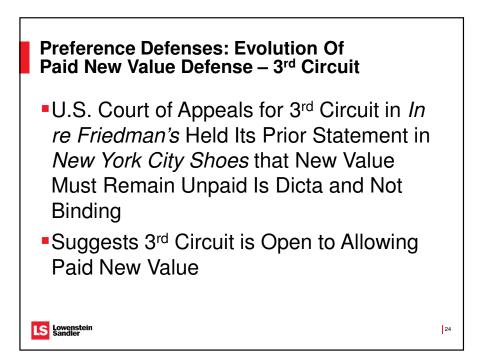


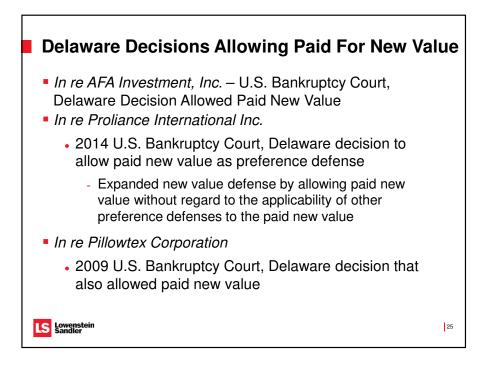


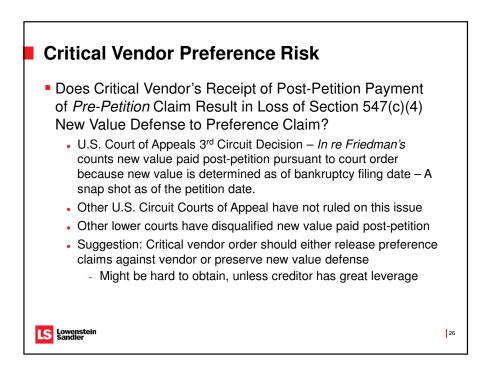


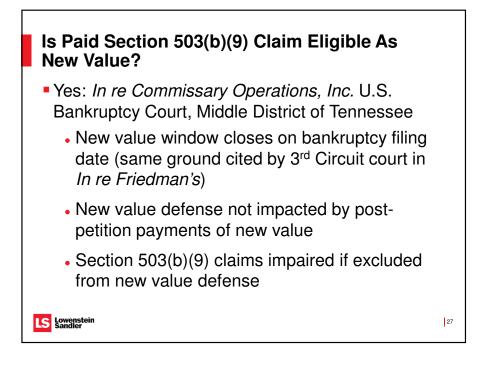


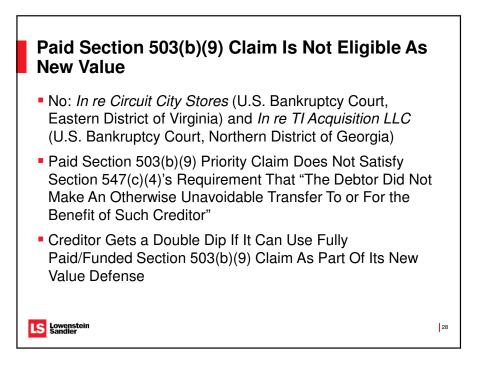


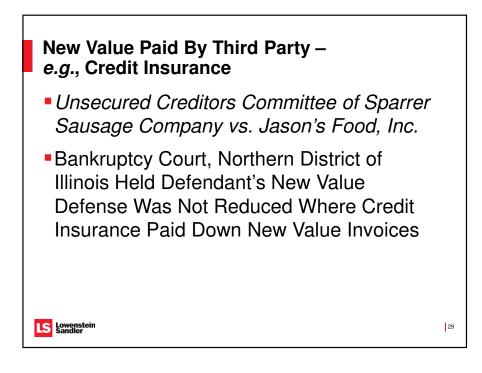


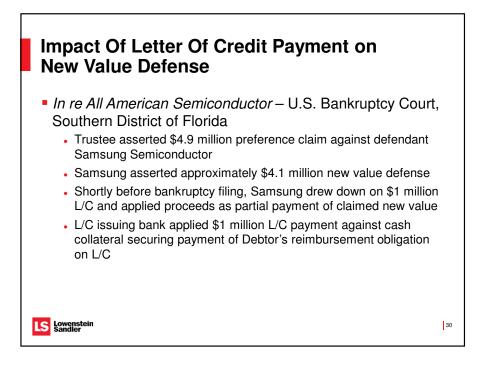


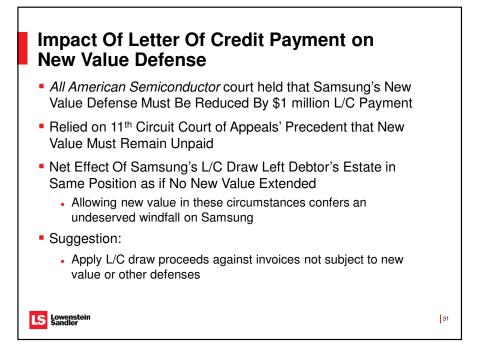


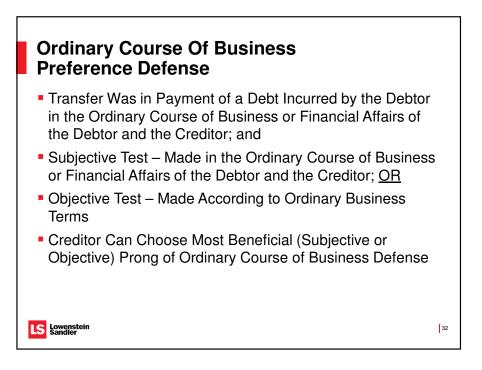


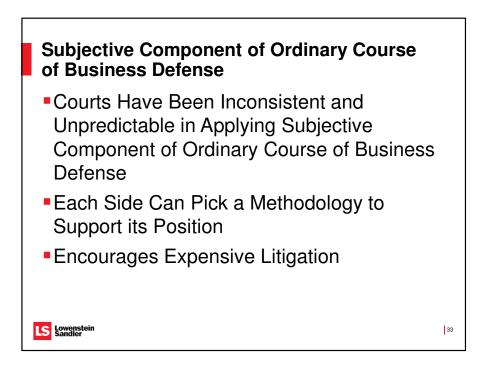


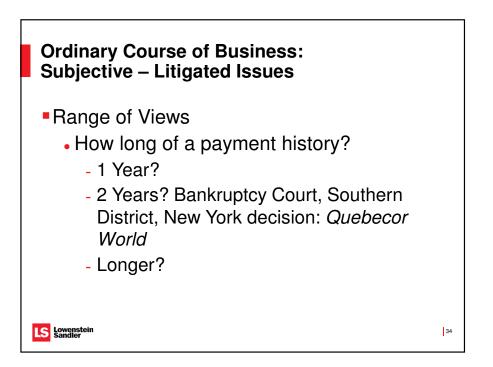


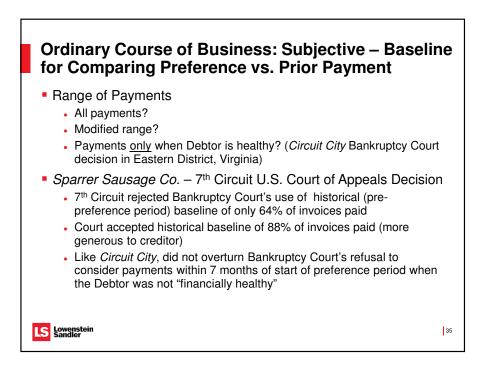


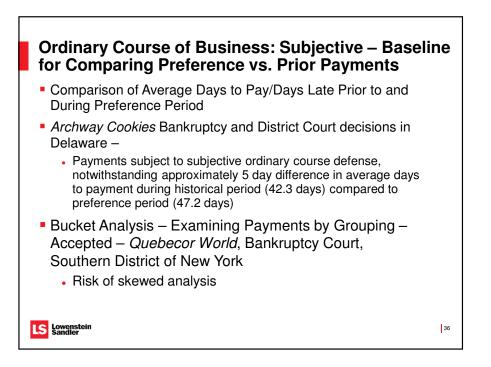








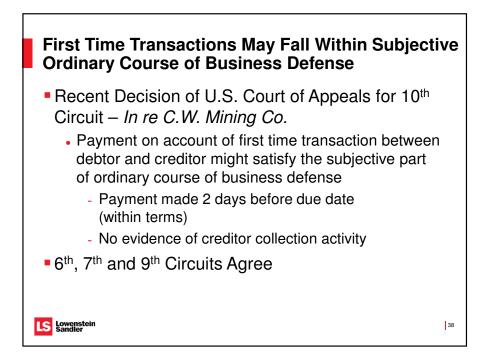






- Quebecor World, Bankruptcy Court, Southern District of New York – Subjective Ordinary Course of Business Defense Inapplicable
 - 30 days off average [27.56 average days outstanding prior to preference period vs. 57.16 average days outstanding during preference period] too much
 - Court relied on weighted average not disputed
- Sierra Concrete Design, Bankruptcy Court, Delaware -Defendant Proved Subjective Ordinary Course of Business Defense After Trial
 - Did not matter that debtor paid invoices 27.9 days faster during preference period
 - Average days-to-pay prior to preference period was 55.22 days
 - Average days-to-pay during preference period was 27.3 days

Lowenstein Sandler 37

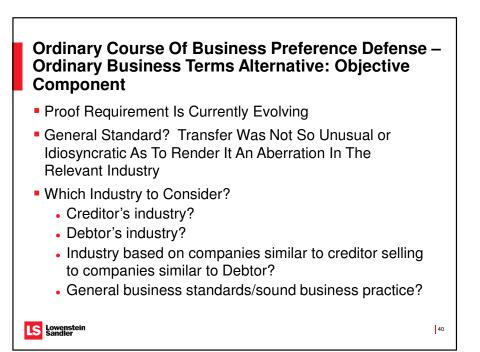


Subjective Ordinary Course of Business Preference Defense – Facts That Defeat Subjective Ordinary Course of Business On the Numbers

- Consistency In Timing of Payments Prior to and During Preference Period Alone Might Not Be Sufficient to Prove Subjective Component of Ordinary Course of Business Defense
- Threats to Subjective Component
 - Change in the form of payment during preference period (regular check to wire, ACH, etc.)
 - · Change in method of invoicing (electronic to paper)
 - Change in credit terms
 - Imposition of credit limit/enforcement of existing credit limit
 - · Threats to stop shipment; imposition of credit holds
 - Change in mode of delivery (regular mail to Federal Express or hand delivery)

39

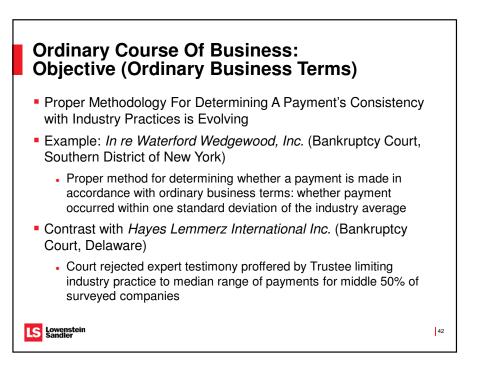
LS Lowenstein



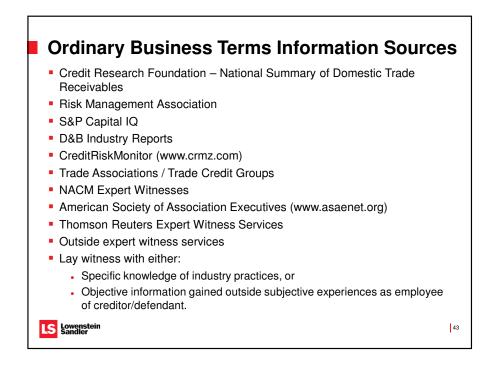
Ordinary Course Of Business Preference Defense – Ordinary Business Terms Alternative: Objective Component

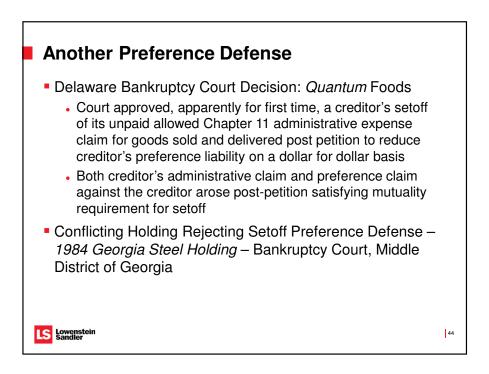
- Includes Range of Industry Terms
 - No need to prove single set of business terms within an industry
 - Ordinary Business Terms may vary widely across industries
- Creditor's Changing of Business Terms Does Not Necessarily Result in Loss of Objective Ordinary Course of Business Defense
 - Are new terms frequently used in industry?

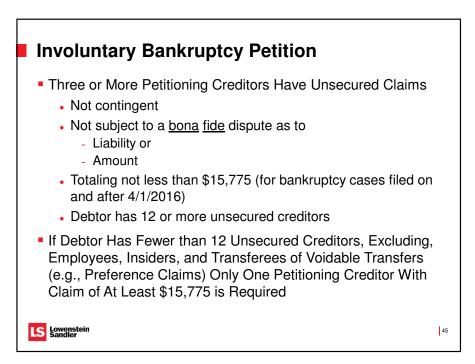
LS Lowenstein

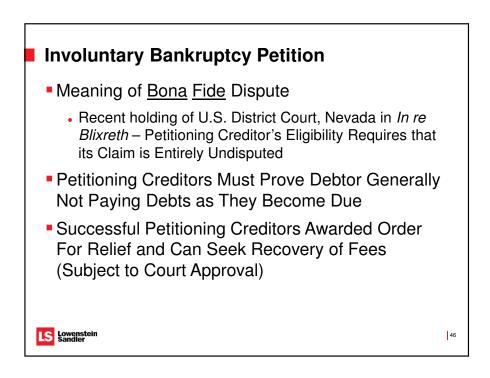


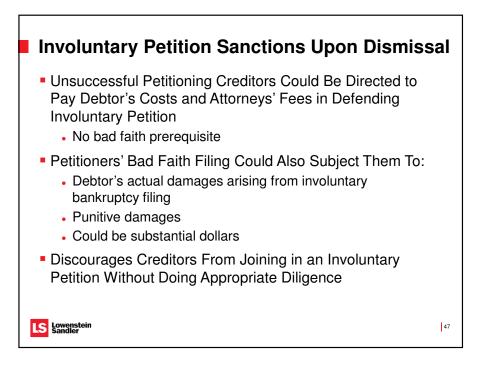
41

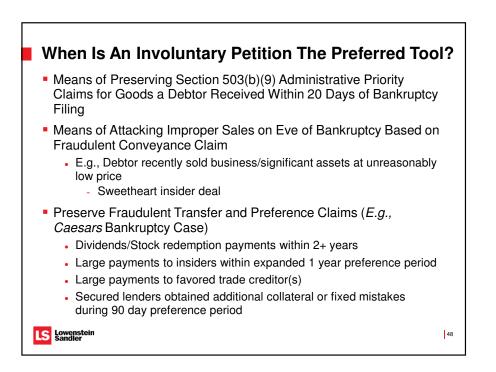


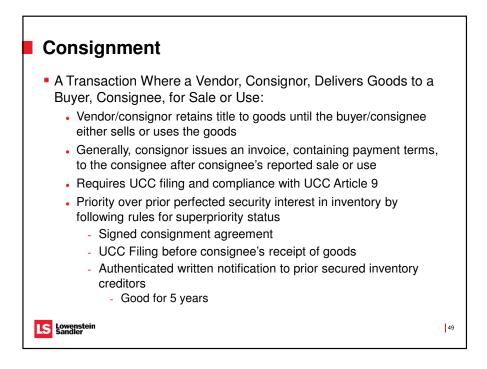


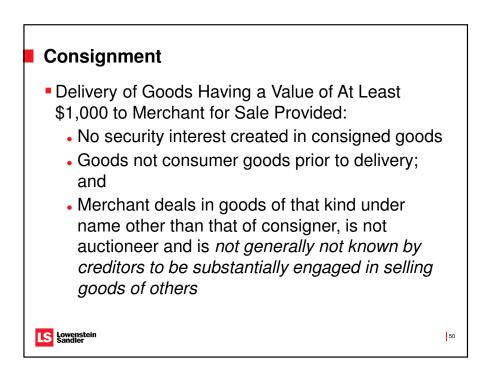




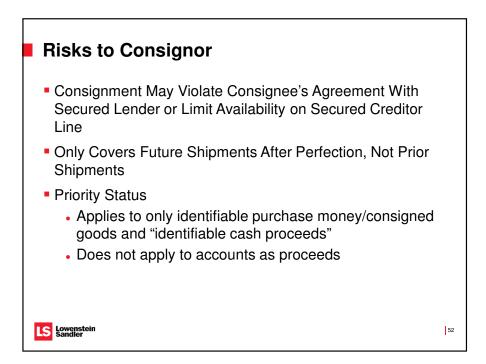








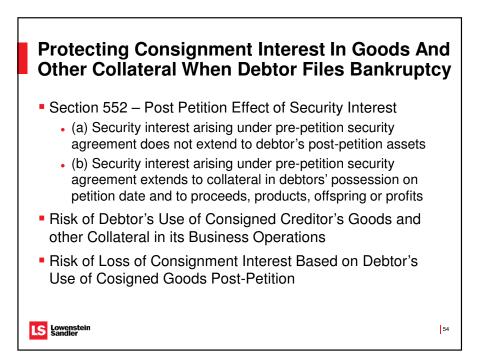




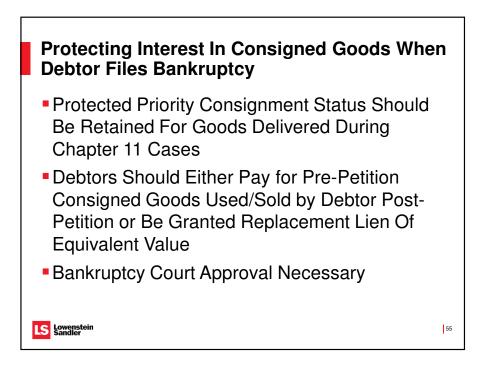


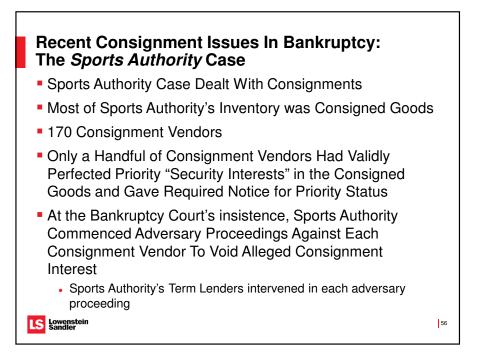
- Automatic Stay Prevents a Secured Creditor From:
 - Collecting pre-petition claim or
 - Recovering goods and other collateral subject to security interest
 - Unless the secured creditor obtains relief from the stay from the Bankruptcy Court

LS Lowenstein

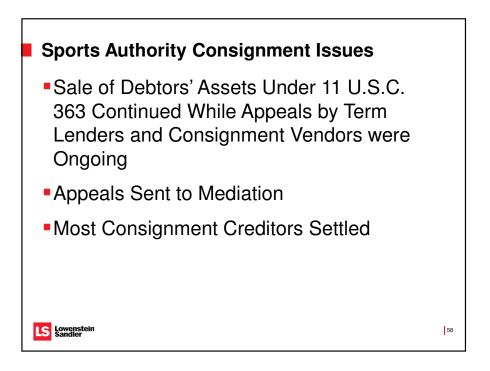


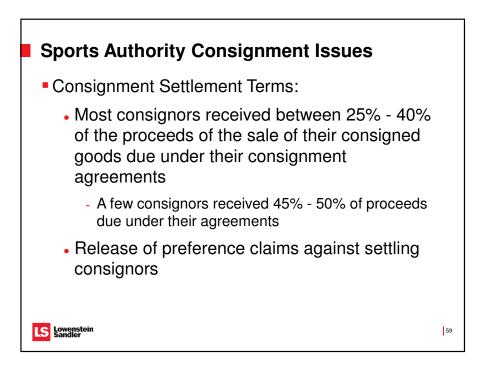
53

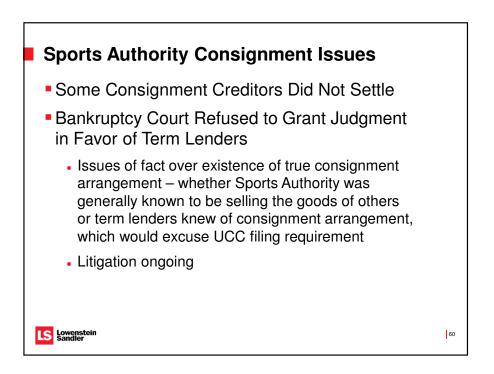
















Bruce S. Nathan

Partner, New York

Bankruptcy, Financial Reorganization & Creditors' Rights

T: 212.204.8686 | F: 973.422.6851 E-mail: <u>bnathan@lowenstein.com</u>

Bruce S. Nathan is a partner in Lowenstein Sandler's Bankruptcy, Financial Reorganization & Creditors' Rights Department. Bruce has over more than 35 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. Bruce also handles letters of credit, guarantees, security, consignment, bailment, tolling, and other agreements for the credit departments of institutional clients.

Among his various legal recognitions, Bruce received the Top Hat Award in 2011, a prestigious annual award honoring extraordinary executives and professionals in the credit industry. He 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. He is a frequent presenter at industry conferences throughout the country, as well as a prolific author regarding bankruptcy and creditors' rights topics in various legal and trade publications.



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*

Bar Admissions

New York



Bruce S. Nathan

Partner, New York

RECENT PUBLICATIONS

- 1Q, 2018
 <u>Trade Credit Insurance as Protection from Bankruptcy Preference Risk: Negotiating for the Broadest Coverage</u>, *CRF News*
 Bruce S. Nathan, James Stewart
- February, 2018 <u>A Chapter 11 Debtor's Right to Use Cash Collateral Trumps PACA Trust Rights</u>, Business Credit Bruce S. Nathan, Eric Chafetz
- January 2018 <u>The Subsequent New Value Preference Defense for Services: A Practical Approach</u>, Business Credit Bruce S. Nathan, Eric Chafetz
- December 2017 <u>Third Circuit Applies Plain Meaning to "Receipt" Under §503(b)(9)</u>, American Bankruptcy Institute Journal Bruce S. Nathan, Scott Cargill
- November/December 2017
 <u>Construction Suppliers Beware: The Bankruptcy Code's Automatic Stay May Bar Post-Petition</u> <u>Perfection of Your Lien Rights</u>, *Business Credit*, Bruce S. Nathan, Eric Chafetz
- September/October 2017 <u>Receipt under Section 503(b)(9) Means Physical Receipt: A Mixed Bag for Trade Creditors</u>, *Business Credit* Bruce S. Nathan, Eric Chafetz

For addition information about Bruce Nathan and his publications please visit Bruce's webpage at <u>www.lowenstein.com/bnathan</u>



Eric Chafetz

Counsel, New York

Bankruptcy, Financial Reorganization & Creditors' Rights

T: 646.414.6886 | F: 973.422.6469 E-mail: <u>echafetz@lowenstein.com</u>

Creditors' committees, trade creditors, and plan/liquidating trustees involved in complex bankruptcies regularly turn to Eric for strategic counsel on creditors' rights. He also represents secured creditors in connection with their use of cash collateral and related adequate protection issues, and he advises debtors on various phases of their reorganization efforts.

Eric frequently negotiates:

- Cash collateral and debtor-in-possession (DIP) financing orders
- Bid procedures, bid procedures orders, sale orders, and the underlying corporate transaction documents
- Plans of reorganization, liquidation trust agreements, plan supplements, plan support agreements, and rights offering procedures

Additionally, Eric advises clients on their rights associated with the assumption and assignment of executory contracts and the cure amounts associated therewith.

Eric is well-versed in all aspects of the claims resolution and reconciliation process. Clients benefit from his extremely successful track record in investigating and prosecuting actions against officers, directors, and lenders, as well as in prosecuting and defending hundreds of preference actions.

A leader in his field, Eric participated in the American Bankruptcy Institute (ABI) Commission's Avoidance Power Subcommittee's study of the aspects of the Bankruptcy Code involving preferences, creditors' reclamation rights, and creditors' rights under Section 503(b)(9). Eric is also a prolific author and has published numerous articles addressing various cutting-edge issues in journals geared toward trade creditors.



Education

- Brooklyn Law School (J.D. 2004), cum laude
- University of Michigan (B.A. 2000)

Bar Admissions

- New York
- New Jersey



Eric Chafetz

Counsel, New York

RECENT PUBLICATIONS

- February, 2018 <u>A Chapter 11 Debtor's Right to Use Cash Collateral Trumps PACA Trust Rights</u>, Business Credit Bruce S. Nathan, Eric Chafetz
- January 2018 <u>The Subsequent New Value Preference Defense for Services: A Practical Approach</u>, Business Credit Bruce S. Nathan, Eric Chafetz
- 4th Quarter 2017 <u>Jevic – A Paradigm Shift for General Unsecured Creditors? Only Time Will Tell</u>," CRF News Eric Chafetz, Nicole Fulfree
- November/December 2017
 <u>Construction Suppliers Beware: The Bankruptcy Code's Automatic Stay May Bar Post-Petition</u> <u>Perfection of Your Lien Rights</u>, *Business Credit*, Bruce S. Nathan, Eric Chafetz
- October 5, 2017 <u>AE Liquidation: Does the Third Circuit Provide Little Warning to Employees of Distressed</u> <u>Companies?</u>," *Global Banking & Finance Review* Eric Chafetz, Michael Papandrea
- September/October 2017 <u>Receipt under Section 503(b)(9) Means Physical Receipt: A Mixed Bag for Trade Creditors</u>, *Business Credit* Bruce S. Nathan, Eric Chafetz

For additional information about Eric Chafetz please visit Eric's webpage at <u>www.lowenstein.com/echafetz</u>





F S In YouTube

lowenstein.com



NEW YORK PALO ALTO

NEW JERSEY

UTAH WASHINGTON, D.C.

© 2018 Lowenstein Sandler LLP